Office - Supreme Court, U.S.
FILED
JUN 8 1982
ALEXANDER L. STEVAS
CLERK

81-2256

No. ———

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JEFFERSON COUNTY, KENTUCKY
WILBUR BILYEU and
RUSSELL McDANIEL - - - - **Petitioners**

versus

DONALD L. HAYS, JR., and
MICHAEL C. POTTER - - - - **Respondents**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. BRUCE MILLER
Jefferson County Attorney
2720 Citizens Plaza
Louisville, Kentucky 40202
Telephone: (502) 584-4178
Counsel of Record for Petitioners

EUGENE L. MOSLEY
NOLD, MOSLEY, CLARE, HUBBARD & ROGERS
Fifth Floor
The Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 582-3891

N. SCOTT LILLY
Assistant Jefferson County Attorney
2720 Citizens Plaza
Louisville, Ky. 40202
Telephone: (502) 584-4178

Counsel for Petitioners

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

I. Is 42 U.S.C. §1983 the Exclusive Remedy for Alleged Constitutional Violations By a Municipality or a County Under the Standards Set Forth in *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978)?

II. What Is the Appropriate Standard of Liability Under 42 U.S.C. §1983 to Be Imposed On Supervisory Police Officials Who Do Not Directly Participate in, Authorize, Approve or Have Prior Knowledge of Alleged Misconduct of Subordinates?

III. In Lawsuits Such as the Instant Case, How Should Jury Instructions Be Structured to Properly Identify the Various Standards of Liability for Supervisory Police Officials and Governmental Entities?

TABLE OF CONTENTS

PAGE

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Citations to Lower Court Opinions and Judgments .. iv

Jurisdictional Statement v

Constitutional Provisions and Statutes .....vi–vii

Statement of the Case 1– 3

Statement of the Facts 3– 6

Reasons for Granting the Writ 6– 9

Argument 9–24

I. Is 42 U.S.C. §1983 the Exclusive Remedy for Alleged Constitutional Violations by a Municipality or a County Under the Standards Set Forth in *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978)?..... 9–13

II. What Is the Appropriate Standard of Liability Under 42 U.S.C. §1983 To Be Imposed on Supervisory Police Officials Who Do Not Directly Participate In, Authorize, Approve or Have Prior Knowledge of Alleged Misconduct of Subordinates? 14–18

III. In Lawsuits Such as the Instant Case, How Should Jury Instructions Be Structured to Properly Identify the Various Standards of Liability For Supervisory Police Officials and Governmental Entities? 18–24

Conclusion 24–26

Appendix 1a–63a

TABLE OF AUTHORITIES

Cases: PAGE

Bivens v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) 9, 13, 21, 22, 23, 24, 25

Dean v. *Gladney*, 621 F. 2d 1331 (5th Cir. 1980) ... 11

Edmonds v. *Dillin*, 485 F. Supp. 722 (N.D. Ohio 1980) 11, 12

Hays and Potter v. *Jefferson County, Kentucky, et al.*, 668 F. 2d 869 (6th Cir. 1982) 3, 6, 7, 12, 14, 15, 17, 18, 19, 21, 22, 23, 24

Hays and Potter v. *Jefferson County, Kentucky, et al.*, 673 F. 2d 152 (6th Cir. 1982) 3, 12, 13

Jones v. *City of Memphis*, 586 F. 2d 622 (1978) .. 8, 11, 12

Molina v. *Richardson*, 578 F. 2d 846 (9th Cir. 1978). 11

Monell v. *New York City Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) 7, 9, 10, 11, 13, 14, 21, 24

Owen v. *City of Independence*, 589 F. 2d 335 (8th Cir. 1978) vac'd and rem'd on other grounds, 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980) 9

Rizzo v. *Goode*, 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976) 8, 14

Turpin v. *Mailet*, 591 F. 2d 426 (2nd Cir. 1979) 9

Constitution, Statutes and Acts:

United States Constitution, Amendment XIV vi

United States Code:

Title 28, U.S.C. §1254(1) v

Title 28, U.S.C. §1331 ..... vi, 2

Title 28, U.S.C. §1343 ..... vi, 2

Title 28, U.S.C. §2101(c) v

Title 42, U.S.C. §1983 ..... vii, passim

Miscellaneous:

Rules of the Supreme Court of the United States, R. 17 26

OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS IN THE LOWER COURTS

1. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), U.S. District Court for the Western District of Kentucky, Memorandum Opinion entered June 29, 1979.

2. *Hays and Potter* v. *Jefferson County, Kentucky et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Judgment entered June 29, 1979.

3. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Memorandum Opinion (award of attorneys fees and costs), entered October 25, 1979.

4. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Order (award of attorneys fees and costs), entered October 25, 1979.

5. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Final Judgment, entered November 19, 1979.

6. *Hays and Potter* v. *Jefferson County, Kentucky, et al.* (consolidated action) Nos. C75-0335L(A) and C76-0424L(A), Amended Final Judgment, entered December 4, 1979.

7. *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, 668 F. 2d 869 (6th Cir. 1982).

8. *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, Order denying Petitions for Rehearing in Banc and Dissent, 673 F. 2d 152 (6th Cir. 1982).

STATEMENT OF GROUNDS FOR SUPREME COURT JURISDICTION

On January 4, 1982 the United States Court of Appeals for the Sixth Circuit issued its Slip Opinion in *Hays and Potter* v. *Jefferson County, et al.*, 668 F. 2d 869 (6th Cir. 1982), which Petitioners now request this Court to review by Petition for Writ of Certiorari. On March 10, 1982, the Sixth Circuit entered an Order, along with a dissent by four of the Circuit Judges, denying the Petitions for Rehearing requested by both Petitioners and Respondents, 673 F. 2d 152 (6th Cir. 1982).

Petitioners believe 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2101(c) confer jurisdiction on this Court to review the Judgment of the United States Court of Appeals for the Sixth Circuit in *Hays and Potter* v. *Jefferson County, Kentucky, et al.*, 668 F. 2d 869 (6th Cir. 1982).

CONSTITUTIONAL PROVISIONS AND STATUTES

Amendment Fourteen, Section One

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C., Section 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

28 U.S.C., Section 1343

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person;

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in

Section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C., Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

JEFFERSON COUNTY, KENTUCKY,
WILBUR BILYEU and
RUSSELL MCDANIEL - - - - *Petitioners*

v.

DONALD L. HAYS, JR., and
MICHAEL C. POTTER - - - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May it please the Court:

STATEMENT OF THE CASE

The instant matter was initiated by Complaints filed by the Plaintiffs, Donald L. Hays, Jr. and Michael C. Potter, in the United States District Court for the Western District of Kentucky at Louisville, alleging violation of their constitutional rights by numerous Defendants including Petitioners, Jefferson County, Kentucky, Russell McDaniel, the then Jefferson County Chief of Police, and Wilbur Bilyeu, a supervisory Jefferson County Police official. The Hays and Potter Complaints, which were consolidated for trial, were based on two causes of action: 42 U.S.C. Section 1983

with jurisdiction under 28 U.S.C. Section 1343 and the second directly under the Constitution with jurisdiction based on 28 U.S.C. Section 1331.

The trial in this action was before the Honorable Charles M. Allen, Chief District Judge, and only the claims against the Petitioners herein were submitted to the jury but on different causes of action. Judge Allen awarded a directed verdict for Jefferson County on Plaintiffs' § 1983 cause of action but retained the County as a Defendant for Plaintiffs' cause of action directly under the Constitution. It was submitted to the jury as a negligence action whereby recovery against Jefferson County was predicated on finding either or both police officials negligent in training, supervision or control of unidentified Jefferson County Police officers. The case against Chief McDaniel and Major Bilyeu, who was in command at the riot where Plaintiffs were injured, was submitted to the jury under § 1983 on the issue of negligent training, supervision or control of unidentified Jefferson County Police officers who actually caused the injuries to Plaintiffs.

The jury returned verdicts against all Defendants for compensatory damages and awarded punitive damages against Major Bilyeu and Jefferson County. All Defendants made appropriate post judgment motions and Judge Allen granted a partial judgment notwithstanding the verdict only on the issue of punitive damages. All Defendants appealed to the United States Court of Appeals for the Sixth Circuit and a cross-appeal was filed by both Plaintiffs. On January 4,

1982, the Sixth Circuit reversed the judgment and remanded the case to the District Court for a new trial. *Hays and Potter* v. *Jefferson County, Kentucky et al.*, 668 F. 2d 869 (6th Cir. 1982). Petitioners and Respondents each filed Petitions for Rehearing En Banc with the Sixth Circuit. By Order dated March 10, 1982, dissent by Merrit, Brown, Kennedy and Martin, Circuit Judges, the Petitions for Rehearing were denied by the Sixth Circuit, 673 F. 2d 152 (6th Cir. 1982).

STATEMENT OF THE FACTS

The factual background surrounding the Complaints of Hays and Potter relate to a violent antibussing demonstration that occurred the night of September 26, 1975 at Bittersweet Shopping Center across from Southern High School in southwestern Jefferson County, Kentucky. A desegregation plan for the combined Jefferson County and Louisville school systems had been implemented earlier in the summer by the United States District Court for the Western District of Kentucky. As a result of this desegregation order, numerous organizations were formed to protest desegregation and numerous demonstrations of varying nature and size were held on a daily basis after the schools opened on September 4, 1975. On the night of September 5, 1975 a civil disturbance of intense violence and riotous nature occurred which prompted the Jefferson County Police Department to purchase jump suits, bulletproof vests, helmet visors and gas masks to protect the police in future riots. Police had be-

come the target of demonstrators anger in many demonstrations, often being struck with rocks, bottles, shingles, asphalt and eggs and suffered such injuries as the loss of an eye by one officer and a broken back by another.

On the day of the incident in question, September 26, 1975, demonstrations had occurred throughout the day in southwest Jefferson County at the Bittersweet Shopping Center across the street from Southern High School as they had almost every day since school began. Major Bilyeu was in command at the scene as he had been at numerous demonstrations. The crowd had grown from 50 to 75 persons in the morning to approximately 300 to 500 persons by 10 P.M. A minimum number of police officers had been present throughout the day but at 7:30 or 8:00 P.M., Major Bilyeu determined that the fire the protestors had built in 55 gallon drums should be extinguished because it was becoming dangerous and he called in 40-50 police officers. Major Bilyeu, who had set up a command point on the Southern High School grounds, went into the crowd to talk to some of the leaders about the fire and an agreement was made that the fire could be extinguished if the policemen were sent away. Major Bilyeu sent the police away and called the Okolona Fire Department. However, when an attempt was made to extinguish the fire, Major Bilyeu and the firemen were both physically threatened and the path to the fire was blocked.

Major Bilyeu then determined it would be necessary to disperse the crowd and he recalled the police to the

scene. The police lined up in front of Southern High School directly across the street from the Bittersweet parking lot. After several warnings were given during an approximate five to ten minute period, approximately 50 to 100 demonstrators remained yelling obscenities and throwing various objects at the police. At this point, teargas was ordered and within 15 to 30 seconds after the gas was fired, the police advanced in a line across the street. Major Bilyeu attempted to delay their advance by ordering over a bullhorn for the police not to cross the street but because of the intense noise and the helmets and gas masks worn by the police, the great majority of officers apparently could not hear the order and continued their advance. Major Bilyeu made no further effort to delay the advance since the officers were acting in accord with their riot control training which permits any supervisory officer in the advancing line to determine when to go forward once the teargas has been fired. Major Bilyeu did not cross the street but remained at the command point. What occurred in the parking lot is the crux of the litigation and the subject of much conflicting testimony. Suffice it to say that much property damage was done either by protestors or police officers, or both, and the two Plaintiffs, Hays and Potter, were injured.

Hays stated he was severely kicked and beaten to the point of convulsions and unconsciousness by approximately five or six unidentified police officers who he said had no identification on their jump suits. Hays spent approximately ten days in the hospital and was

absent from work for a nine week period but suffered no permanent injury or disability.

According to Potter, he was forced by several unidentified officers to place his hands on a car, spreading his legs directly over a teargas canister still spewing gas. Potter testified he was struck several times on the back and shoulders and also received a blow to the knuckles on his right hand before he fell to the ground. Potter was taken to the hospital where he was treated for minor injuries and released. Potter did not miss any time from work.

REASONS FOR GRANTING THE WRIT

Petitioners have presented questions for review by this Court which Petitioners believe are important questions of federal law either wrongly decided or not clearly addressed by the Sixth Circuit. As a preface, Petitioners believe a short summary of the Sixth Circuit's Opinion in *Hays and Potter* v. *Jefferson County, supra,* would be appropriate before delineating the reasons each separate issue presented for review should be resolved by this Court.

Basically, the majority opinion in *Hays, supra,* vacated the verdict and remanded the matter to the trial court because the trial court had erroneously submitted the case to the jury on instructions framed in simple negligence language. The Sixth Circuit held:

> Because this Court holds that simple negligence is insufficient to support liability of high police officials and municipalities for inadequate train-

> ing, supervision, and control of individual officers, we must vacate the verdict and remand this matter to the District Court for a new trial. 668 F. 2d at 871-872.

The Court further concluded that jury instructions questioned by Defendants, Petitioners herein, as being respondeat superior in form and content were appropriate instructions in light of further explanatory language contained in the instructions, 668 F. 2d at 874-875. Finally, the majority determined that Defendants argument regarding the trial court's refusal to give a contributory negligence instruction was groundless because Plaintiffs were intentionally beaten by unidentified police officers and contributory negligence is not a defense to an intentional tort, 668 F. 2d at 875.

In dissent, Judge Merritt believed that Jefferson County was entitled to a directed verdict on Plaintiffs' direct Constitutional cause of action because the District Court had directed a verdict on Plaintiffs' §1983 claim. The directed verdict was granted due to Plaintiffs' failure to offer proof of a policy or custom of the County proximately causing Plaintiffs' injuries. After recognizing that the law was unclear regarding the availability of a direct Constitutional action under the Fourteenth Amendment after this Court's decision in *Monell* v. *New York City Department of Social Services,* 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Judge Merritt stated:

> . . . it is clear that in this Circuit the *Monell* standard also applies to direct actions against mu-

> nicipalities as Judge Phillips stated for the Court in *Jones* v. *City of Memphis,* 586 F. 2d 622, 624-5 (6th Cir. 1978). Since there is no evidence that the harm in question here resulted from a County "policy or custom," tacitly or expressly adopted or followed by the County or its officials. I would hold that the proof is insufficient to permit the case against the County to go to the jury on the direct Bivens-type action. 668 F. 2d at 876.

Judge Merritt was also disturbed by the majority's holding regarding the standard of liability for supervisory police officials under §1983. Judge Merritt discussed what he believed to be this Court's standard of liability as expressed in *Monell, supra,* and *Rizzo* v. *Goode,* 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976). In conclusion, Judge Merritt stated:

> Thus, considering the language of §1983, its original purpose and the statements of the Supreme Court concerning liability in *Monell,* I conclude that in police brutality cases against supervisory officials §1983 requires Plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials. 668 F. 2d at 877.

Petitioners believe that the Sixth Circuit's opinion in *Hays, supra,* is a decision which conflicts with applicable decisions of this Court and with decisions of

other federal Courts of Appeals. The apparent conflicts and the reasons this Court should grant the instant Petition for Writ of Certiorari will be addressed for each separate issue presented for review.

ARGUMENT

I. Is 42 U.S.C. §1983 the Exclusive Remedy for Alleged Constitutional Violations By a Municipality or a County Under the Standards Set Forth in *Monell* v. *New York City Department of Social Services*, 436 U. S. 658 (1978)

This first issue presents a question which the Federal Courts of Appeals have answered in a conflicting way. At least two Circuit Courts of Appeals, the Second and Eighth, have determined that a direct constitutional cause of action no longer exists against a municipality because a §1983 cause of action is now available under the *Monell* decision. *Turpin* v. *Mailet*, 591 F. 2d 426 (2nd Cir. 1979); *Owen* v. *City of Independence*, 589 F. 2d 335 (8th Cir. 1978), vac'd and rem'd on other grounds, 445 U. S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). Each of these decisions followed *Monell* and was based upon the reasoning that §1983 provides an adequate federal remedy in civil rights actions against municipalities. Therefore, there is no reason to imply a cause of action under the Constitution as was done in the bellweather case of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Justice Powell, concurring in *Monell*, apparently layed the foundation for the rationale behind §1983 being the

exclusive cause of action against a municipality when he stated:

> Finally, if we continued to adhere to a rule of absolute municipal immunity under §1983, we would not long avoid the question of whether "we should, by analogy to our decision in *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). imply a cause of action directly from the Fourteenth Amendment which would not be subject to the liimtations contained in §1983 . . . " *Mt. Healthy City Board of Ed.* v. *Doyle,* 429 U. S. 274, 278, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). One aspect of that inquiry would be whether there are any "special factors counseling hesitation in the absence of affirmative action by Congress," *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), such as an "explicit congressional declaration that persons injured by a [municipality] may not recover damages . . . , but must instead be remitted to another remedy, equally effective in the view of Congress" *Id.* at 397, 91 S. Ct. 1999, 29 L. Ed. 2d 619. In light of the Court's persuaive re-examination in today's decision of the 1871 debates, I would have difficulty inferring from §1983 "an explicit congressional declaration" against municipal liability for the implementation of official policies in violation of the Constitution. Rather than constitutionalize a cause of action against local government that Congress intended to create in 1871, the better course is to confess error and set the record straight, as the

> Court does today. *Monell,* 436 U. S. at 712-713 (footnote omitted).

Several other Circuits have found it unnecessary to decide the question of exclusive remedy due to the co-extensive availability of §1983. See, *Molina* v. *Richardson,* 578 F. 2d 846 (9th Cir. 1978) and *Dean* v. *Gladney,* 621 F. 2d 1331 (5th Cir. 1980). Several other circuits who have addressed the issue, including the Sixth Circuit, have held that a *Bivens*-type action is still available. See, *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978).

As an example of the confusion these conflicting appellate decisions have caused among the District Courts, an examination of *Edmonds* v. *Dillin,* 485 F. Supp. 722 (N. D. Ohio 1980), a case in one of the districts comprising the Sixth Circuit, would be appropriate. *Edmonds* involved an action for alleged violations of civil rights brought against two cities, their police departments and several other police officers. The *Edmonds* court reviewed the history of the *Jones* and *Turpin* decisions and their relationship to *Monell.* In *Edmonds,* the Court held:

> In light of the Supreme Court's remand in *Turpin* and the Second Circuit's subsequent reversal of its earlier decision, in which the Sixth Circuit in *Jones* relied, this Court concludes that the Sixth Circuit, if it today decided the question, would not reach the same result it reached in *Jones.* Therefore, Plaintiffs do not have a direct cause of action under the Fourteenth Amendment. *Edmonds, supra* at page 728.

However, the Sixth Circuit's opinion in *Hays* failed to confirm the predictions of the *Edmonds* court. In *Hays,* the Sixth Circuit not only failed to affirm or overrule the same result it reached in *Jones* on this issue, but failed to directly address the issue at all. As pointed out by the Circuit Judges dissenting from the Order denying the Petitions for Rehearing En Banc, 673 F. 2d 152 (6th Cir. 1982), such failure made the majority opinion "internally inconsistent." The reason for this internal inconsistency is probably best summarized by the following passage taken from that dissent:

> The District Judge granted a directed verdict on the Plaintiff's claim under §1983 because as against the County there had been no showing of "policy or custom" as required by *Monell* v. *New York City Department of Social Services,* 436 U. S. 658 (1978). The question then is whether a different standard applies in a direct action under the Fourteenth Amendment. Our Court's opinion in *Jones* v. *City of Memphis,* 586 F. 2d 622, 624-5 (6th Cir. 1978) and good policy both require that the "policy or custom" standard be the same whether the action against the County is under §1983 or directly under the Fourteenth Amendment. Since the majority decision remands the case for a new trial in the direct action under the Fourteenth Amendment against the County, it is necessarily saying that the standard in the two types of actions is somehow different. Yet the majority opinion seems to be saying that the two standards are the same. Since the trial judge directed a verdict under §1983, it follows that if

> the same standard is used in the direct action, the trial court must direct a verdict there as well. 673 F. 2d at pp. 152-153.

Thus, the critical point to remember is that Plaintiffs' §1983 cause of action and *Bivens*-type action are factually and legally identical. As a result, the question Petitioners are asking this Court to decide is whether the availability of a §1983 action against municipalities recognized in *Monell* abrogates the availability of a *Bivens*-type action as Justice Powell hypothesized in his concurring opinion in *Monell*. As has been demonstrated, the Circuit Courts of Appeals are split on this issue thus making it a question ripe for this Court to decide. Even if this Court should determine that a direct constitutional cause of action is still available against municipalities, Petitioners believe the Court should rule that the standards of liability applicable to both §1983 and *Bivens*-type actions must be identical and consistent. Otherwise, lower courts could be in the untenable and illogical position of applying a lesser standard of liability on municipalities in *Bivens* actions than required in §1983 actions although the basis in fact for both actions is identical.

II. What Is the Appropriate Standard of Liability Under 42 U.S.C. §1983 to Be Imposed On Supervisory Police Officials Who Do Not Directly Participate in, Authorize, Approve or Have Prior Knowledge of Alleged Misconduct of Subordinates.

One of the more confusing aspects of the Sixth Circuit's Opinion in *Hays, supra,* is the enunciation and application of the standard of liability to be imposed on supervisory police officials under 42 U.S.C. §1983. It would appear that the rule laid down by the Sixth Circuit and its application to the instant matter are in conflict. The Sixth Circuit relied heavily on *Monell, supra,* and *Rizzo, supra,* as the foundation for supervisory police official liability. The Sixth Circuit noted:

> The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo* v. *Goode,* 423 U. S. at 370-71. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell* v. *Department of Social Services,* 436 U. S. 658 (1978). 668 F. 2d at 872.

The Sixth Circiut goes on to explain the application of this standard and intimates, just as Judge Merrit did in his dissent, that a knowledge element is necessary:

> A major part of the doctrinal foundation for requiring a higher degree of culpability than ordinary negligence is the concern that such a standard would unduly impede or circumscribe the

> performance of official duties. *The Courts look for some proof that a defendant has a culpable state of mind—that the action or failure to act was to some degree deliberate rather than inadvertent.* (Emphasis added) 668 F. 2d at 873.

After an in-depth examination of the various applications and verbal formulations of the *Rizzo* concept, the Sixth Circuit determined:

> The result of *Rizzo* in subsequent cases in the lower Federal Courts applying the standards it announced is that a failure of a supervisory official to supervise, control or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. See, e.g., *Liete* v. *City of Providence,* 463 F. Supp. 585 (D. R.I. 1978).
>
> Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g., *Liete* v. *City of Providence,* 463 F. Supp. 590, or would properly be characterized as substantially certain to result, *Rheuark* v. *Shaw,* 477 F. Supp. 897 (N.D. Texas 1979). 668 F. 2d at 874.

It is critical to note from the above quote that the Sixth Circuit felt that "negligent training" was the crucial issue in the instant matter. If so, the failure of the Sixth Circuit to reverse and instruct the District Court to enter judgment for the supervisory police officials, as Judge Merritt recommended in his dissent, is error. As noted in Petitioner's original brief to the Sixth Circuit, the Trial Court had indicated to counsel for both parties that training was not an issue (Tr. Vol. VI, p. 117).[1] This determination came subsequent to the testimony of Plaintiff's expert on riot control training, George Tomberlin, who testified that he could not discern any deviation from proper riot control techniques by Major Bilyeu on the evening of the incident (Tr. Vol. V, p. 86). Mr. Tomberlin's only criticism was the inability of the line personnel to hear Major Bilyeu's command not to cross the street (Tr. Vol. V, p. 86). Bilyeu's testimony indicated that he did not attempt to further impede the progress of the police line because he only wanted more time for the tear gas to disseminate and the men were advancing as trained (Tr. Vol. VII, p. 167).

It is also important to note insofar as direct participation in the alleged misconduct is concerned, that Major Bilyeu did not cross the street with his men. Again, Mr. Tomberlin, Plaintiffs' expert, testified that this is recommended procedure in riot control training

[1]All Transcript references cited herein are included in the Appendix at 45a-47a in the order they appear in the body of this petition.

techniques (Tr. Vol. V, pp. 84-85). Additionally, John Nevin, Chief of the Louisville Police Department at the time of the incident and present at Bittersweet on the night in question, characterized Major Bilyeu's actions and those of his men prior to the time they actually entered the parking lot as "conducted as close by the book as you could do it. They—the people who launched gas and the movements were very professional" (Tr. Vol. IV, pp. 139-140).

Thus, under the Sixth Circuit's standard of liability for supervisory officials and the testimony of Plaintiff's own expert at trial, it was patently obvious that there was not the first scintilla of evidence introduced indicating "essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . ." *Hays, supra,* at p. 874. Judge Merritt recognized the incongruity of the majority holding in this regard and stated in his dissent:

> Thus, considering the language of §1983 its original purpose in the statements of the Supreme Court concerning liability in *Monell,* I conclude that in police brutality cases against supervisory officials §1983 requires plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials. 668 F. 2d at 877.

Therefore, absent evidence of a past pattern of misconduct and absent evidence of a reckless or grossly negligent training of the police force, under its own rule of supervisory police official liability, the Sixth Circuit erred by failing to direct the District Court to enter judgment in favor of Bilyeu and McDaniel.

III. In Lawsuits Such as the Instant Case, How Should Jury Instructions Be Structured to Properly Identify the Various Standards of Liability for Supervisory Police Officials and Governmental Entities?

The Sixth Circuit's failure to properly address the issue of the availability of a direct constitutional cause of action in light of this Court's holding in *Monell, supra,* creates far more problems than is readily apparent on the surface. The inconsistencies which permeate the *Hays* Opinion cause so much confusion that it is impossible to logically apply its opinion to litigation of the instant nature. The Sixth Circuit seemingly holds that the two causes of actions, §1983 and a direct claim under the constitution, are controlled by identical standards of liability. However, because the Trial Court awarded Jefferson County a directed verdict on Plaintiffs' §1983 claim, the Sixth Circuit's remand order for a new trial indicates the two causes of action are somehow different. If the two causes of action are identical in their standards of liability, then Jefferson County should also be awarded a directed verdict on Plaintiffs' direct constitutional cause of action. Further, if a supervisory official's liability is dependent upon some proof that such de-

fendant has a culpable state of mind, then, as the *Hays* dissent pointedly demonstrates, the supervisory officials in the instant case should also be awarded a directed verdict.

When one attempts to apply the *Hays* opinion in drafting appropriate jury instructions, the snowball of confusion rapidly approaches avalanche proportions. In their briefs to the Sixth Circuit, the Petitioners questioned several portions of the instructions to the jury by the Trial Court. However, the Sixth Circuit only addressed one particular issue and misconstrued Petitioners' argument regarding the impropriety of the questioned instructions. The instructions in question are as follows:

> This is also a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, because of alleged negligent acts or omissions of high ranking Jefferson County officials, namely Police Chief Russell McDaniel and Assistant Police [Chief] Wilbur Bilyeu, arising out of actions of officers of the Jefferson County Police force which took place on September 26, 1975 at the Bittersweet Shopping Center. A government can act in this case, only through its high ranking officials, Chief McDaniel and Assistant Chief Bilyeu. The burden is on the plaintiffs to establish by a preponderance of evidence in this case that the negligence of one or both of the officials, Chief McDaniel and Assistant Chief Bilyeu, was a proximate cause of any injuries and consequent damages sustained by the plaintiffs.

1. That officers of the Jefferson County Police force knowingly beat, bruised and wounded Plaintiffs or either of them about the body.

2. *That Chief McDaniel and Assistant Chief Bilyeu were employed by Jefferson County as Chief of Police and Assistant Chief of Police respectively, at the time of the injuries referred to herein.*

3. That Chief McDaniel and Assistant Chief Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such negligence in supervision, training and control was the proximate cause of the injuries of the Plaintiffs or either of them, inflicted upon them by police officers on the occasion complained of.

You are further instructed that you may not return a verdict against the Defendant, Jefferson County, if you believe from the preponderance of the evidence that the Plaintiffs were injured by policemen of Jefferson County merely because of the fact that these policemen were employees of Jefferson County, Kentucky. In other words, if you believe that Chief McDaniel and Assistant Chief Bilyeu adequately supervised, trained and controlled the police officers, then you shall return a verdict for the Defendant, Jefferson County, even though you may believe, from the preponderance of the evidence, that individual policemen in employment of Jefferson County knowingly beat, bruised and wounded the Plaintiffs on the occasion

complained of. (Emphasis added) 668 F. 2d at 874-875.[2]

Petitioners argued at the Trial Court and in the Sixth Circuit that these instructions predicated liability under an improper respondeat superior relationship. The Sixth Circuit determined that the Trial Court had drawn the proper distinction in the final paragraph of the above instructions and noted that Petitioners' argument ignored the fact that a governmental entity can only act through its principal officials. 668 F. 2d at p. 875.

Petitioners still maintain the instructions are improper and the reason is two sided in nature. If a governmental entity acts only through its prinicpal officials, it obviously acts through those "whose edicts or acts may fairly be said to represent official policy." *Monell, supra,* 436 U. S. at 694. Since a county can act only through its principal officials who are policy makers, then the questioned instructions seek to impose liability on Jefferson County for the alleged "policy" actions of Bilyeu and McDaniel. However, since the Trial Court had already awarded Jefferson County a directed verdict on Plaintiffs' §1983 claims, it would be incongruous to then attempt to hold Jefferson County liable for alleged "policy" actions of its principal officials in a *Bivens* cause of action.

Secondly, if the two causes of action are somehow different and the governmental entity has received a

---

[2]The entire charge to the jury appears for the Court's convenience in the Appendix at 48a-63a.

directed verdict on the §1983 claim, under what theory can the government entity properly be held liable for the *non* policy making actions of its principal officials? Petitioners believe that any jury instruction for a *Bivens* claim which is framed in language other than plan or policy acts of principal officials necessarily imputes liability to the governmental entity on a respondeat superior basis. Once plan or policy has been excluded, the acts of the principal official are no longer the acts of the governmental entity and only the employment relationship, or respondeat superior, remains.

The questioned instructions set forth, *supra,* are obviously framed in "employee" respondeat superior language and not "prinicpal official" plan or policy language. Because the Trial Court had granted Jefferson County a directed verdice on Plaintiffs' §1983 claim due to the lack of proof on the plan or policy issue, Judge Allen could not frame the *Bivens*-type action instructions in plan or policy terms and be consistent with the §1983 directed verdict. The Sixth Circuit apparently ignored the directed verdict granted Jefferson County on Plaintifs' §1983 claim and, in relation to the above instructions, noted:

> The distinction drawn by the Trial Judge in the final paragraph of the above instruction correctly distinguished the acts of the unidentified individual officers, for which Jefferson County cannot be held responsible absent a policy or custom causing such conduct, e.g., *Monell* v. *Department of Social Services,* 436 U. S. 658 (1978); *Rizzo* v. *Goode,* 423 U. S. 362, 370-71 (1976), and a failure

> to train, supervise or control those officers by Defendant's Chief of Police McDaniel and Assistant Chief Bilyeu, whose failure, for this purpose, would be the failure of Jefferson County as well. 668 F. 2d at 875.

What the Sixth Circuit fails to perceive in this passage is that the failure to train, supervise and control issue was also a core issue of Plaintiffs §1983 plan or policy claim against Jefferson County. With the plan or policy issue settled by the directed verdict under §1983, the Sixth Circuit necessarily intimates by the above passage that the standard of liability for Plaintiffs' *Bivens* claim is somehow different.

As further evidence of the confusion caused by the instructions in the instant case, Petitioners would note the following directive given by the Trial Court in its §1983 portion of the instructions to the jury:

> If you should award punitive damages as against Major Bilyeu such award should also run against the Defendant, Jefferson County.

Because Jefferson County had already been awarded a directed verdict on Plaintiffs' §1983 cause of action, this instruction permitted the jury to award punitive damages against Jefferson County even though it was no longer a viable Defendant in Plaintiffs' §1983 cause of action. Although the Trial Court eventually remitted the punitive damage aspect of the jury award, this instruction points out the confusion suffered by the district courts in these types of actions.

Thus, the incongruity and confusion evidenced by the *Hays* opinion needs to be rectified by a precise opinion by this Court as to the standards of liability to be used and the proper framing of jury instructions in that regard.

CONCLUSION

The instant case is an example of the confusion and lack of consistency throughout the circuits on the question of whether a *Bivens*-type action is still available against a governmental entity in light of this Court's decision in *Monell, supra,* which held governmental entities may be liable under §1983 for constitutional deprivations caused by a plan or policy of the governmental entity. Without a succinct opinion from this Court, the Circuit Courts of Appeal are irreconcilably split on the issue which has resulted in a total inconsistency in the administration of justice. The most devastating effect of this situation is that the District Courts are completely bereft of any universal rule of law which they can apply in dealing with governmental entity liability as well as liability of its officers and agents.

The instant case pointedly demonstrates the snowball effect that this confusion causes in attempting to apply an appropriate standard of liability for the acts of supervisory police officials. The *Monell* decision left many fundamental questions unanswered which are absolutely crucial to a determination of the critical questions of liability standards for various defendants.

What exactly constitutes a plan or policy, other than ordinances and regulations of the governmental entity, which may subject a governmental entity to liability under §1983? When is a supervisory police official a "principal official" of the governmental entity, if ever? At what rank can a supervisory police officer be considered such a "principal official"; sergeant, lieutenant, captain, major, assistant chief or chief of police? Under what circumstances, if any, are the acts of a supervisory police official considered a plan or policy of his governmental employer? Absent a controlling decision by this Court on these types of questions, the lower courts cannot possibly deal adequately with the intricacies presented by civil rights litigation.

The most debilitating aspect of the questions presented for this Court's review, is the inability of the District Courts to adequately frame appropriate instructions for a jury to determine the correct standards of liability for governmental entities and its supervisory police officials in actions like the instant matter. Lack of controlling precedent will continue to create incongruity in jury instructions of the nature exemplified by the jury instructions in the instant case. After the Trial Court had awarded Jefferson County a directed verdict on Plaintiffs' §1983 claim, it permitted the Plaintiffs' *Bivens*-type claim against the County to go to the jury on a different and lesser standard of liability. Worse, as previously noted herein, the Trial Court gave a punitive damage instruction under its §1983 instructions which permitted a punitive damage award against Jefferson County if the

jury determined that punitive damages were appropriate against Major Bilyeu. Because Jefferson County had been awarded a directed verdict on Plaintiffs' §1983 claim, it is totally ludicrous that punitive damages could be awarded against it when it is no longer a party to that portion of Plaintiffs' claim. This punitive damage instruction acutely demonstrates the continuing confusion district courts will suffer in these types of actions without a definitive opinion by this Court.

Thus, Petitioners respectfully request the Court to grant their Petition for Writ of Certiorari for the reasons stated herein all of which conform to the considerations governing review on certiorari set forth in Rule 17 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

J. Bruce Miller
Jefferson County Attorney
2720 Citizens Plaza
Louisville, Kentucky 40202
Counsel of Record for Petitioners

Eugene L. Mosley
Nold, Mosley, Clare, Hubbard & Rogers
Fifth Floor
The Hart Block Building
730 West Main Street
Louisville, Kentucky 40202
Telephone: (502) 582-3891

N. Scott Lilly
Assistant Jefferson County Attorney
2720 Citizens Plaza
Louisville, Ky. 40202
Telephone: (502) 584-4178

Counsel for Petitioners

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 80-3010, 80-3011

DONALD L. HAYS, JR., and
MICHAEL C. POTTER, - - - *Plaintiffs-Appellees, Cross-Appellants,*

v.

JEFFERSON COUNTY, KENTUCKY,
WILBUR BILYEU and
RUSSELL MCDANIEL - - - *Defendants-Appellants, Cross-Appellees.*

OPINION

Argued October 21, 1980
Decided January 4, 1982

Before MERRITT and JONES, Circuit Judges, and GIBSON,* District Judge.

This civil rights case arose from a violent altercation between police and demonstrators on the night of September 26, 1975, at Bittersweet Shopping Center in southwestern Jefferson County, Kentucky. The final judgment below awarded plaintiff Hays compensatory damages of $20,000 against Jefferson County, and $5,000 each against Col. Russell McDaniel and Major Wilbur Bilyeu. Plaintiff Potter was awarded compensatory damages of $2,000 against Jefferson County, and $500 each against McDaniel and Bilyeu. Jefferson County was further ordered to pay $20,000 to counsel for plaintiffs as attorneys fees.

---

*The Honorable Benjamin F. Gibson, Judge, United States District Court for the Western District of Michigan, sitting by designation.

The court below, on a motion for judgment notwithstanding the verdict, remitted the jury's award of punitive damages to plaintiff Hays of $81,000 against Jefferson County and $9,000 against Bilyeu. The award of punitive damages to plaintiff Potter of $9,000 against Jefferson County and $1,000 against Bilyeu was also remitted.

The Bittersweet Shopping Center is across from Southern High School. The September 26, 1975 demonstration was one of many that took place during the preceding weeks to protest court ordered busing for school desegregation, which had been implemented on September 4, 1975 with the beginning of the school year. The demonstrations occurred at sites throughout Jefferson County and in downtown Louisville as well as the Bittersweet Center. Many of these demonstrations were peaceful and orderly, although some had resulted in varying degrees of violence.

The September 26th demonstration at Bittersweet began uneventfully. Later, a fire was built in the front of the parking lot, adjacent to Preston Highway. Although originally contained, the fire grew over time. The crowd also grew as the day progressed from about 50 to 75 people in the morning to approximately 300 to 500 people by late in the evening. At about 7:30 or 8:00 p.m. defendant Bilyeu made a determination that the fire was becoming dangerous and should be extinguished. He called in reinforcements and within a few minutes 40 to 50 police officers arrived. With the presence of these policemen the crowd became agitated. After consulting with some of the leaders of the demonstration Major Bilyeu sent them away and called the fire department. When the firemen arrived, however, a small group of demonstrators prevented them from putting the fire out. At this time Major Bilyeu decided that the crowd was out of control and had to be dispersed. He sent the firemen away and recalled the

police. The police assembled in the Southern High School parking lot and prepared to disperse the crowd.

The descriptions of various witnesses as to what occurred shortly before and at the time the police entered the Bittersweet parking lot were conflicting. There was conflicting testimony as to the number of warnings to disperse given to the crowd, the number of demonstrators that were still at the scene at the time the police entered the parking lot, the amount of tear gas used, and what the crowd was doing.

After the warnings to disperse, tear gas was fired into the crowd. Within 15 to 30 seconds the police crossed the street and entered the crowd. The police began their advance toward the crowd before Major Bilyeu ordered them to do so. He attemtped to stop them with the repeated bullhorn command "don't cross the street." When this proved ineffective, however, he took no further action to control them.

Plaintiffs' witnesses from all areas of the Bittersweet Shopping Center testified to widespread damage to vehicles caused by police officers. There was even some police testimony as to property damage caused by police. Nor was the police violence confined to property. Several witnesses testified to seeing police officers striking demonstrators and passersby with their riot sticks and pushing and kicking some of them.

The police were all wearing blue jumpsuits, gloves, helmets and gas masks. Many witnesses testified to an inability to identify any individual police officer although they attempted to do so. Defendants admit that identification patches had not been sewn onto the jumpsuits, at least in part because the suits had been obtained only a short time before this incident. There was considerable testimony that the vast majority of the officers were not wearing their nametags on the jumpsuits. A Jefferson County Police

Department lieutenant testified that probably 90 percent of the police officers had no identification tags on.

During the course of the violence that evening plaintiff Potter was struck across the knuckles and repeatedly on the back and shoulders by a group of unidentified police officers. Plaintiff Mays was severely beaten and kicked into a grand mal seizure and unconsciousness by another group of five of six unidentified officers. They were also subjected to considerable verbal abuse. Both men were taken to the hospital where Potter was treated and released. Hays spent approximately ten days in the hospital. Each of the plaintiffs had been taking part in the demonstration and had taken part in others previously. Neither had had any difficulty at any other demonstration, nor was either arrested or charged with a crime for their activities at the Bittersweet Shopping Center.

[1, 2] The defendants in this action are the county and the chief and deputy chief of the county police department. Plaintiff's theory of liability was based on the defendants' negligent training, supervision, and control of the unidentified officers. The trial court's instructions were based on a simple negligence standard.[1] Because this Court

---

[1]The trial court stated that the action as based on "the alleged *negligent* acts or omissions" of the defendants (Tr. Vol. IX, at 49), that the "burden of the proof is on the plaintiffs to establish by a preponderance of the evidence that the *negligence* of one or both of the officials" caused the damages (*id.*), and "that Chief McDaniel and Assistant Chief Bilyeu or either of them *negligently* supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such *negligence*" caused the injuries (*id.* at 50) (emphasis added).

The instructions defined the term negligence as follows:

> You are further instructed that negligence is lack of ordinary care. It's the failure to exercise the degree of care which a

(Footnote continued on following page)

holds that simple negligence is insufficient to support liability of high police officials and municipalities for inadequate training, supervision, and control of individual officers, we must vacate the verdict and remand this matter to the District Court for a new trial.

The question of whether simple negligence is sufficient to support a civil rights action for the violation of constitutional rights, either under 42 U.S.C. § 1983 or directly under the constitution with jurisdiction based on 28 U.S.C. § 1331, has been troublesome to the bench and bar for some time. In *Baker* v. *McCollan*, 443 U. S. 137, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979), Mr. Justice Rehnquist, writing for the majority of the Supreme Court, said "[W]hether

---

(Footnote continued from preceding page)

reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances or, on the other hand, for failing to do an act which a reasonably prudent person would have done under the circumstances.

Negligence requires a foreseeable danger of injury to another and conduct which is unreasonable in proportion to the danger. A person is not responsible for the consequences of his conduct unless the risk of injury was reasonably foreseeable. The exact occurrence or precise injury need not have been foreseeable, but injury as a result of negligent conduct must have been not merely possible but probable. If a reasonably prudent person couldn't foresee any injury as a result of his conduct or if his conduct was reasonable in light of what he could foresee, there's no negligence.

Conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct and his conduct was unreasonable in the light of what he could foresee. Ordinary and prudent care is that care which persons of ordinary prudence, . . . would use in order to avoid injury to themselves or others.

Tr. Vol. IX, at 51-52.

an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." *Id.* at 139-40, 99 S. Ct. at 2692. Several of the lower federal courts have addressed the question in various contexts with seemingly varying results.

[3] The law is clear that liability of supervisory personnel must be based on more than merely the right to control employees. Without more, such a theory would allow liability on a *respondeat superior* basis—a basis expressly rejected by the Supreme Court in *Monell* v. *Department of Social Services,* 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978) under § 1983, and by this court in *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978) in a direct constitutional action pursued in accordance with the case of *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Specifically, the Supreme Court in *Monell* stated: "By our decision in *Rizzo* v. *Goode,* 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and without and failure to supervise is not enough to support § 1983 liability. See 423 U. S., at 370-371 [96 S. Ct., at 603-604]." *Monell* v. *Department of Social Services,* 436 U. S. at 694 n. 58, 98 S. Ct. at 2037. The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo* v. *Goode,* 423 U. S. at 370-71, 96 S. Ct. at 603-604. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell* v. *Department of So-*

cial Services, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

The language and history of § 1983 are silent as to whether supervisory officials and municipalities can be held liable for negligently having failed to adequately train, supervise, and control individual police officers who violate a plaintiff's constitutional rights. The language of § 1983 providing that a person who "subjects, or causes to be subjected" another to a deprivation of constitutional rights appears on its face to be broad enough to encompass merely negligent deprivations. The broad potential of this language is bolstered to some extent also by the Supreme Court's declaration that "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U. S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492 (1961). The trend of the case law, however, has not been in this direction. Rather, the case law has limited § 1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train, or control was involved. *See, e.g., Jamison* v. *McCurrie*, 565 F. 2d 483 (7th Cir. 1977); *Bonner* v. *Coughlin*, 545 F. 2d 565 (7th Cir. 1976) (en banc); *Parker* v. *McKeithen*, 488 F. 2d 553 (5th Cir.), *cert. denied*, 419 U. S. 838, 95 S. Ct. 67, 42 L. Ed. 2d 65 (1974); *Edmonds* v. *Dillin*, 485 F. Supp. 722 (N.D. Ohio 1980); *Rheuark* v. *Shaw*, 477 F. Supp. 897 (N.D. Texas 1979); *Leite* v. *City of Providence*, 463 F. Supp. 585 (D.R.I. 1978); *Schweiker* v. *Gordon*, 442 F. Supp. 1134 (E.D. Pa. 1977); *cf. Rizzo* v. *Goode*, 423 U. S. 362, 370-71, 96 S. Ct. 598, 603-604, 46 L. Ed 2d 561 (1976). *But see, Carter* v. *Carlson*, 144 U. S. App. D.C. 388, 447 F 2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom., District of Columbia* v. *Carter*, 409 U. S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973).

A major part of the doctrinal foundation for requiring a higher degree of culpability than ordinary negligence is the concern that such a standard would unduly impede or circumscribe the performance of official duties. The courts look for some proof that a defendant has a culpable state of mind — that the action or failure to act was to some degree deliberate rather than inadvertent. The verbal formulations of this concept have varied from gross negligence or recklessness, *Owens* v. *Haas*, 601 F. 2d 1242 (2nd Cir. 1979); *White* v. *Rochford*, 592 F. 2d 381 (7th Cir. 1979); *Jenkins* v. *Averett*, 424 F. 2d 1228 (4th Cir. 1970); *Leite* v. *City of Providence*, 463 F. Supp. 585 (D.R.I. 1978); *Schweiker* v. *Gordon*, 442 F. Supp. 1134 (E. D. Pa. 1977); *Perry* v. *Elrod*, 436 F. Supp. 299 (N.D. Ill. 1977), to actions or failures to act which, though not intended to harm the plaintiff, were so likely to violate plaintiffs' rights and cause them injury that the harm was "substantially likely to result," *Rheuark* v. *Shaw*, 477 F. Supp. 897 (N.D. Texas 1979), to "purposeful non-feasance" in the face of a duty to act, *see Bonner* v. *Coughlin*, 545 F. 2d 565 (7th Cir. 1976), to an apparent requirement of intent, *see Edmonds* v. *Dillin*, 485 F. Supp. 722 (N.D. Ohio 1980), but in practical terms the underlying concept appears to be similar in the vast majority of the cases.[2]

[4] The major impediment to simple negligence as a basis for liability of supervisory officials and municipalities, however, is the Supreme Court's decision in *Rizzo* v. *Goode*, 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976). In

---

[2]*But see, Carter* v. *Carlson*, 144 U.S. App. D.C. 388, 447 F. 2d 358 (D.C. Cir. 1971), *rev'd on other grounds sub nom., District of Columbia* v. *Carter*, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973) (negligent failure to train or supervise police force is actionable under § 1983). As will be seen, *infra*, it is significant that this case predates the Supreme Court's decision in *Rizzo* v. *Goode*, 423 U. S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976).

Rizzo the Court reversed the lower court's grant of injunctive relief against Philadelphia city and police department officials because the plaintiffs had failed to show an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." *Id.* at 371, 96 S. Ct. at 604. The Court made it clear that a showing of "direct responsibility" for the actions of the individual officers is a prerequisite for liability. The mere *"failure* to act [even] in the face of a statistical pattern" of incidents of misconduct was held to be insufficient to base liability on. *Id.* at 376, 96 S. Ct. at 606. Although *Rizzo* involved equitable relief in the form of a somewhat comprehensive injunction of future conduct, and federalism concerns played a not insignificant part in the decision, this same standard has been adopted and applied in cases involving monetary relief. *E.g., Leite* v. *City of Providence,* 463 F. Supp 585, 590 (D.R.I. 1978); *Perry* v. *Elrod,* 436 F. Supp. 299, 303-04 (N.D. Ill. 1977) *Delaney* v. *Dias,* 415 F. Supp. 1351, 1354 (D. Mass. 1976). The result of *Rizzo* and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control, or train the offending individual officers is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers. *See e.g., Leite* v. *City of Providence,* 463 F. Supp. 585 (D.R.I. 1978).

[5] Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only

where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, *e.g., Leite* v. *City of Providence,* 463 F. Supp. at 590, or would properly be characterized as substantially certain to result, *Rheuark* v. *Shaw,* 477 F. Supp. 897 (N.D. Texas 1979).

Although many of the cases cited for the above analysis were brought pursuant to § 1983, the court finds the reasoning therein equally apposite to direct constitutional actions sanctioned by the Supreme Court's reasoning in *Bivens* v. *Six Unknown Named Agents,* 403 U. S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). The court, at least on the facts here presented, sees no basis for different standards in the two types of actions.

[6] There remains some significant issues to be disposed of so that on remand a new trial may be properly conducted. Defendant Jefferson County challenges the judgment against it as impermissibly based on a *respondeat superior* theory of liability. *Respondeat superior* was rejected as a sole basis for municipal liability in a 1983 action by *Monell* v. *Department of Social Services,* 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and in a *Bivens* action by this Court in *Jones* v. *City of Memphis,* 586 F. 2d 622 (6th Cir. 1978). The heart of the County's challenge concerns the following jury instruction given by the trial judge below:

> This is also a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, because of alleged negligent acts or omissions of high ranking Jefferson County officials, namely Police Chief Russell McDaniel and Assistant Chief Wilbur Bilyeu, arising out of actions of officers of the Jefferson County Police Force which took place on

September 26, 1975 at the Bittersweet Shopping Center. A government can act in this case, only through its high ranking officials, Chief McDaniel and Assistant Chief Bilyeu. The burden is on the plaintiffs to establish by a preponderance of the evidence in this case that the negligence of one or both of the officials, Chief McDaniel and Assistant Chief Bilyeu, was a proximate cause of any injuries and consequent damages sustained by the plaintiffs.

In order for plaintiffs to recover against defendant, Jefferson County, the burden of proof is upon the plaintiffs to establish each of the following elements:

1. That officers of the Jefferson County Police Force knowingly beat, bruised and wounded plaintiffs or either of them about the body.

2. *That Chief McDaniel and Assistant Chief Bilyeu were employed by Jefferson County as Chief of Police and Assistant Chief of Police respectively, at the time of the injuries referred to herein.*

3. That Chief McDaniel and Assistant Chief Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such negligence in supervision, training and control was the proximate cause of the injuries of plaintiffs or either of them, inflicted upon them by police officers on the occasion complained of.

You are further instructed that you may not return a verdict against the defendant, Jefferson County, if you believe from the preponderance of the evidence that the plaintiffs were injured by policemen of Jefferson County merely because of the fact that these policemen were employees of Jefferson County, Kentucky.

> In other words, if you believe that Chief McDaniel and Assistant Chief Bilyeu adequately supervised, trained and controlled the police officers, then you shall return a verdict for the defendant, Jefferson County, even though you may believe, from the preponderance of the evidence, that individual policemen in employment of Jefferson County knowingly beat, bruised and wounded the plaintiffs on the occasion complained of. (emphasis added)

Jefferson County argues, in spite of the last paragraph quoted above, that this instruction, in particular the emphasized section, bases its liability solely on the employment relationship between it and the other defendants, which it equates with the *respondeat superior* doctrine. This argument, however, ignores the fact that a governmental entity can only act through its principal officials, *e.g., Leite* v. *City of Providence,* 463 F. Supp. at 589. The distinction drawn by the trial judge in the final paragraph of the above instruction correctly distinguished the acts of the unidentified individual officers, for which Jefferson County can not be held responsible absent a policy or custom causing such conduct, *e.g., Monell* v. *Department of Social Services,* 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978); *Rizzo* v. *Goode,* 423 U. S. 362, 370-71, 96 S. Ct. 598, 603-604, 46 L. Ed. 2d 561 (1976), and a failure to train, supervise, or control those officers by defendants Chief of Police McDaniel and Assistant Chief Bilyeu, whose failure, for this purpose, would be the failure of Jefferson County as well. The negligence standard in paragraph 3 of the instruction, of course, must be modified to accord with this opinion, but the instruction is otherwise proper.

[7] Defendants next argue that the trial court's refusal to give a contributory negligence instruction to the jury was error. It is their contention that the plaintiffs' failure to

leave the scene after police orders to disperse was contributorily negligent on their part. Such an argument on the facts of this case is groundless. Plaintiffs were not injured negligently, they were intentionally beaten by the unidentified police officers. Contributory negligence has never been a defense to intentional tortious conduct. Such conduct differs from negligence not only in degree but in kind, and in the societal condemnation attached to intentional torts, *W. Prosser, Law of Torts*, 426 (4th ed. 1971). Plaintiffs' alleged negligence in failing to leave the area in no way relates to the allegations against the defendants in this case.

Addressing the other issues raised by the parties, relating to the good faith defense, punitive damages[3] and attorney fees, is not necessary in light of today's decision. The parties will have the opportunity to further address these issues below as appropriate.

Accordingly, the judgment below is vacated, and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

MERRITT, Circuit Judge, dissenting.

This case raises two sets of issues. One concerns the standard of liability of the County under 42 U.S.C. § 1983 and directly under the Fourteenth Amendment. The other concerns the standard of liability of the police chief and his deputy as supervisory officials under § 1983.

I. LIABILITY OF THE COUNTY

With respect to the County, I believe that the reasoning of *Monell* v. *New York City Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), re-

---

[3] In the recent case of *City of Newport* v. *Fact Concerts, Inc.*, ____ U.S. ____, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981), the Supreme Court held that municipalities are immune from punitive damages in § 1983 actions.

quires that plaintiffs show that the County followed a "policy or custom" of encouraging, or at least not discouraging, police brutality in order to recover under § 1983 or in a direct action under the Fourteenth Amendment. The District Court directed a verdict on the § 1983 claim because plaintiffs failed to offer proof of a "policy or custom" under *Monell*. But the District Court let the direct Fourteenth Amendment action under § 1331 against the County go to the jury under a negligence standard. This was error. Although it is unclear after *Monell* whether the Supreme Court will approve this Circuit's implication of a *Bivens*-type direct action under the Fourteenth Amendment, it is clear that in this Circuit the *Monell* standard also applies to direct actions against municipalities, as Judge Phillips stated for the Court in *Jones* v. *City of Memphis*, 586 F. 2d 622, 624-25 (6th Cir. 1978). Since there is no evidence that the harm in question here resulted from a county "policy or custom," tacitly or expressly adopted or followed by the county or its officials, I would hold that the proof is insufficient to permit the case against the County to go to the jury on the direct *Bivens*-type action. In order to establish such a policy or custom, the plaintiff must at least show that the city had notice of a prior pattern of police misconduct likely to recur if no steps were taken to prevent it. As I understand the record, there was no such proof in this case.

II. LIABILITY OF SUPERVISORY POLICE OFFICIALS UNDER § 1983

With respect to the two individual defendants, neither negligence alone, as the District Court charged the jury, nor gross negligence alone, as the majority seems to hold, should be the exclusive standard of liability for supervisory police officials under § 1983. If police officials do not directly participate in a federal constitutional violation,

the question is under what circumstances should they be held accountable when their agents commit an illegal seizure of the citizen's person or engage in conduct amounting to summary punishment. Under what circumstances should such supervisory officials be liable for failing in their duty to "protect" citizens against police brutality?

Where the supervisory official does not direct, encourage, or otherwise participate in the wrong committed by his agent, it seems clear that "fault"—a "neglect" or refusal to train or take other protective action in advance—is only one element of liability. Another element is also necessary. The official must have "knowledge" that the constitutional injury is likely to occur unless action is taken. There must be some past pattern of misconduct, some prior misbehavior, or other prior act that puts the official on notice of the potential constitutional deprivation. In this case the police officials affirmatively tried to stop the advance of the policeman on the crowd of anti-busing demonstrators, and as our Court states at page 874 of its opinion, there is no allegation or proof that the brutality was "part of a pattern of past misconduct." Therefore, although a jury might find on the facts of this case a "neglect" to give police officers adequate riot training, it could not find the requisite "knowledge" or "notice" of prior misconduct.

The knowledge element is derived from the purpose of § 1983. It was part of the anti-Ku Klux Klan act of 1871, a primary purpose of which was to impose a "duty of protection" on local officials, a duty to protect blacks from the night riders and others who systematically deprive them of their civil rights. In light of this purpose, it is clear that police officials should be liable when they fail to take any steps to remedy a *known* pattern of police brutality. Where, however, there is no proof of a pattern of prior misconduct known to the officials, they should not be held

liable under § 1983 for simply failing to provide adequate training.

This "knowledge" element seems implicit in Justice Brennan's analysis of § 1983 for seven members of the Court in *Monell*, as well as in Justice Powell's concurring opinion. In analyzing the "language of § 1983" Justice Brennan states:

> Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent. See *Rizzo* v. *Goode*, 423 U. S. 362, 370-71, 96 S. Ct. 598, 603-604, 46 L. Ed. 2d 561 (1976).

This sentence is followed by a footnote which states in pertinent part:

> Support for such a conclusion can be found in the legislative history. . . . The primary constitutional justification for the Sherman Amendment was that it was a necessary and proper remedy for the failure of localities to protect citizens . . . and according to Sherman, Shellabarger, and Edmunds, the amendment came into play only when a locality was at fault or had *knowingly neglected its duty to provide protection.* (Emphasis added.)

436 U. S. at 662, 98 S. Ct. at 2036. This language from *Monell* indicates to me that knowledge of the impending constitutional violation is a necessary element of the constitutional tort.

In his concurring opinion which attempts to further explain the rationale of the majority opinion, Justice Powell notes that liability under § 1983 should be read as limited to "affirmative conduct," *id.* at 706, 98 S. Ct. at 2043,

or read "as a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Id.* at 707, 98 S. Ct. at 2044.

Thus, considering the language of § 1983, its original purpose and the statements of the Supreme Court concerning liability in *Monell*, I conclude that in police brutality cases against supervisory officials § 1983 requires plaintiff to show knowledge of a past pattern of misconduct or some prior misbehavior or some other prior act that puts the official on notice of the potential constitutional deprivation. Since there was no showing of the knowledge element of the wrong in this case, I would reverse and instruct the District Court to enter judgment for the supervisory police officials.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., ET AL. - - - *Defendants*

MEMORANDUM OPINION—Entered 6/29/79

These consolidated actions were tried before a jury and resulted in jury verdicts for the two plaintiffs in the total amount of $133,000. Of this amount, $90,000 represented punitive damages awarded against Jefferson County and $10,000 punitive damages against Major Wilbur Bilyeu. Compensatory damages in the total amount of $20,000 were awarded plaintiff Hays as against the County, and $2,000 compensatory damages were awarded Potter as against the County. The jury also awarded Hays $5,000 as against Colonel Russell McDaniel as compensatory damages, and awarded Potter $500 as compensatory damages against Col. McDaniel. Hays also was awarded $5,000 as compensatory damages against Bilyeu, while Potter was awarded $500 as compensatory damages against Bilyeu.

The defendants contend vigorously that the Court should not have submitted the case to the jury under the Fourteenth Amendment and 28 U.S.C. Sec. 1331. They rely upon the theory that the Supreme Court, by its recent

decision in *Monell* v. *Department of Social Services of The City of New York*, 436 U. S. 658 (1978) is the sole remedy for constitutional violations of an individual's rights by a municipality or county. They also rely upon the decision of the Second Circuit in *Turpin* v. *Mailet*, 591 F. 2d 426 (1979), which expressly holds that there is no need for a cause of action under the Fourteenth Amendment and 28 U.S.C. Sec. 1331, since the Supreme Court has given authority to proceed in *Monell, supra*, under 42 U.S.C. Sec. 1983. However, this Court is bound by the decisions of the United States Court of Appeals for the Sixth Circuit, barring any controlling Supreme Court decisions.

In *Jones* v. *City of Memphis, Tennessee*, 586 F. 2d 622 (6th Cir. 1978), decided three months after *Monell, supra*, the court stated, on page 624 "(t)his Circuit has held consistently that a direct cause of action under 28 U.S.C. Sec. 1331 for violation of constitutional rights is available against a municipality." (citing cases). The court then went on to state that six other circuits had reached the same conclusion.

Finally, the court stated that appellee had not contended that the City of Memphis was negligent in failing to provide proper training and supervision of the police officers who allegedly violated appellee's constitutional rights. The court pointed out, also, that appellee had not argued that the City ratified or condoned the alleged misconduct. Therefore, the court held that the complaint should have been dismissed because it only alleged the doctrine of *respondeat superior*. The court reasoned that it would be incongruous to hold that *respondeat superior* could be invoked against a municipal corporation in an action under 28 U.S.C. Sec. 1331, when the doctrine has no application in an action under 42 U.S.C. Sec. 1938. See 586 F. 2d at p. 625.

Jones v. *City of Memphis, supra,* having been decided three months after *Monell, supra,* seems to stand for two propositions. The first is that a direct cause of action is still available under 28 U.S.C. Sec. 1331, and the second is that *respondeat superior* is not available in an action against a municipality under either Secs. 1331 or 1983.

We have reviewed the instructions submitted to the jury and find that they expressly directed the jury not to return a verdict against the defendants on the theory of *respondeat superior.* The instructions did authorize the jury to return a verdict if they believed that Col. McDaniel or Major Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command, and that such negligence was the proximate cause of the injuries of the plaintiffs. We believe that such an instruction was appropriate in the light of the language in *Jones* v. *City of Memphis, supra,* found at p. 624 with regard to the failure of the appellee to contend that the City of Memphis was negligent in failing to provide proper training and supervision of police officers who allegedly violated his constitutional rights.

Defendant, Jefferson County, has alleged that it is immune from the payment of any judgment rendered against it because it is a political subdivision of the State. It relies on *Edelman* v. *Jordan,* 415 U. S. 651 (1974). However, that reliance is misplaced, since the Supreme Court there pointed out that a suit by private parties seeking to invoke a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. See 415 U. S. at p. 663. Here there is no showing that the judgments rendered against the County will be paid from the state treasury.

Defendant also complains about the failure of the Court to give a contributory negligence instruction based on the theory that there was evidence that the plaintiffs dis-

regarded the warnings given them by the defendants to leave the shopping center. The answer to this contention is that, while negligence of Major Bilyeu and Col. McDaniel was alleged with regard to the training and supervision of the police officers, it is apparent that the injuries of the plaintiffs were due to the use of intentional force by unknown police officers. As is held in *Haber* v. *County of Nassau*, 557 F. 2d 322 (2nd Cir. 1977), where there is an intentional tort, contributory negligence is not a defense.

This Court did instruct the jury on the good faith defense asserted by the defendants and told the jury that it should find for the defendants in the event that it found the injuries were inflicted upon the plaintiffs by the defendants while acting in the lawful discharge of their duties to disburse the crowd.

We come now to a much more troublesome question, and one which is of great importance to the administration of justice. The question is whether there was evidence in the case from which a reasonable jury could award punitive damages against Major Bilyeu and the County.

Punitive damages, generally, are awarded to punish wrongdoers for conduct which is oppressive or malicious, or which shows wanton disregard for the rights of a plaintiff. See, e.g., *Vetters* v. *Berry*, 575 F. 2d 90 (6th Cir. 1978); *Rieser* v. *District of Columbia*, 563 F. 2d 562 (D.C. Cir. 1977). However, mere inadvertence or even gross negligence is insufficient for an award of punitive damages. See, e.g., *Rieser, supra*. In assessing the legal standards applicable to punitive damages, it should further be noted that the Sixth Circuit has held that:

> ". . . in Civil Rights cases the common law of a state may be used on the issue of damages where it better serves the policies expressed in the federal stat-

utes." *McDaniel* v. *Carroll*, 457 F. 2d 968, 969 (6th Cir. 1972).

A review of Kentucky law indicates that where, as in the case at bar, the punitive damage award appears excessive in light of the amount of actual damages shown, the award should be closely scrutinized. As noted in *Henderson* v. *Henderson Federal Home Corp.*, 320 S. W. 2d 113 (Ky. 1959):

> "While it has been said that it is not essential that punitive damages, where authorized, bear any reasonable relation to the actual damages suffered . . . , it is necessary, because of the absence of such a limitation, that there be *no reasonable basis* for concluding that the former flow from a consideration of incompetent evidence so likely to inflame the passion and prejudice of the jurors." (Emphasis added) 320 S. W. 2d at p. 116.

The evidence is uncontradicted that Major Bilyeu, the officer-in-charge on the night the injuries were suffered by plaintiffs, did everything within his power to conciliate the demonstrators at the Bittersweet Shopping Center. Only after much provocation from certain persons among the demonstrators did Major Bilyeu order the firing of tear gas and the advance of the police across the street into the shopping center. The only evidence presented upon which this Court submitted the question of punitive damages to the jury was that presented by one officer to the effect that 90% of the police officers he observed on that night were unidentified. His testimony on cross-examination was more tentative, however. While there was evidence by many of the witnesses for the plaintiffs that the officers they saw were unidentified, there was no evidence introduced from which a jury could find that the presence of

unidentified officers was due to any malicious, wanton or oppressive conduct by Major Bilyeu. Therefore, we now believe that upon consideration of the competent evidence in the case with regard to Major Bilyeu's conduct, there is not sufficient evidence upon which a reasonable jury could find Major Bilyeu liable for punitive damages.

With regard to the punitive damage award against the County, while the individual unidentified police officers who struck the plaintiffs were certainly guilty of conduct which would authorize an award of punitive damages, the County, under *Jones, supra,* can only be held liable insofar as the actions taken by Major Bilyeu at the shopping center represent the *de facto* policy of the County. See, *Lewis* v. *Kugler,* 446 F. 2d 1343 (3rd Cir. 1971); *Schwell* v. *City of Chicago,* 407 F. 2d 1084 (7th Cir. 1969). Further limiting potential County liabilty for punitive damages is the fact that, as a general matter, courts have recognized strong policy considerations militating against the award of punitive damages against a governmental unit. See, e.g., *Rieser, supra,* at p. 481. However, it is not necessary in the case at bar for the Court to reach the merits of such considerations since, as noted above, the evidence does not indicate that Major Bilyeu, as the *de facto* policy maker of the County, was guilty of conduct which would warrant an award of punitive damages. Therefore, the same reasoning as is noted with regard to the liability of Major Bilyeu for punitive damages is applicable to the County and the punitive damage award against the County should, likewise, be set aside.

We note the defendant's arguments concerning alleged errors by the Court with regard to the introduction of evidence concerning the investigation made by the Police Department, or lack of investigation made by the Police Department, after the Bittersweet incident. The Court fully instructed the jury not to consider any of this evi-

dence, and to strike it entirely from their minds. We believe that the evidence was correctly conditionally received, upon the theory which was advanced by the plaintiffs, that the Police Department had, in effect, ratified and condoned the actions of individual unidentified police officers by failing to find out who these officers were who had been guilty of misconduct. When it became obvious to the Court that this line of inquiry could not be satisfied by the evidence, the Court so advised the parties and later instructed the jury.

Defendants complain of the testimony of a witness to the effect that a police officer told him that the officers had been authorized to beat up demonstrators. No objection was made by the defendants at the time this evidence was introduced, and the Court accordingly, did not make any rulings with regard thereto. We do not believe that the introduction of this evidence without objection constitutes good grounds for a new trial.

Finally, the defendants contend that the verdicts are excessive and should be reduced. While it does appear that plaintiff Hays will now recover a total of $30,000 as compensatory damages, and plaintiff Potter will recover a total of $3,000 as compensatory damages, these amounts do not appear to be excessive. Plaintiff Hays was knocked unconscious and was absent from work for a total of nine weeks. He also had to be taken to St. Joseph Infirmary, and to be kept as a patient there for a period of time, and incurred medical expenses in the amount of $4,540. Also, plaintiff Hays suffered property damage to his automobile in the amount of $5,000 and his loss of wages represented a total of $2,700, of which the Court only allowed the jury to consider $356 for his lost wages up to October 17, 1975 and a further sum of $1,461.18 as lost wages from October 17, 1975 to November 15, 1975, if the jury believed that

Hays was unable to return to work prior to November 15, 1975.

As to plaintiff Potter, he incurred medical expenses in the amount of $93.52.

Defendants have cited no cases which would show under the present inflationary economic situation that the amount of compensatory damages to plaintiffs is excessive, therefore, those awards will be affirmed.

We have this day entered our judgment in conformity with this opinion.

Dated: June 28, 1979

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., Et Al. - - - *Defendants*

JUDGMENT

Defendants, having moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, or in the alternative, for a remittitur, and the Court, having considered the briefs of the parties and having filed its memorandum opinion and being fully advised in the premises,

It Is Ordered and Adjudged as follows:

The motion of the defendants for judgment notwithstanding the verdict is sustained insofar as it pertains to the punitive damages awards rendered against Major Bilyeu and Jefferson County, Kentucky, and is denied insofar as it pertains to the verdicts for compensatory damages against Colonel Russell McDaniel, Major Bilyeu and Jefferson County.

The motion of the defendants for a new trial is overruled.

As to the motion of the defendants for a remittitur, in accordance with these rulings,

It is Now Ordered And Adjudged that plaintiff, Donald L. Hays, Jr., recover the folowing amounts as compensatory damages:

$ 5,000 from Colonel Russell McDaniel
$ 5,000 from Major Wilbur Bilyeu
$20,000 from Jefferson County, Kentucky

It Is Further Ordered and Adjudged that the plaintiff, Michael Potter, recover the following amounts as compensatory damages:

$ 500 from Colonel Russell McDaniel
$ 500 from Major Wilbur Bilyeu
$2,000 from Jefferson County, Kentucky.

It Is Further Ordered and Adjudged that the parties confer as to the question of an appropriate attorneys' fee to be awarded to counsel for plaintiffs, pursuant to 42 U.S.C. Sec. 1988. In the event that counsel are unable to agree within two weeks after entry of this judgment, that it so advise the Court, and an evidentiary hearing will be held to determine the amount to be awarded.

This is not a final and appealable judgment.

(s) Charles M. Allen
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., Et Al. - - - *Defendants*

MEMORANDUM OPINION—Entered 10/25/79

This case is submitted to the Court on the application of plaintiffs for the payment of attorneys' fees in the amount of $91,940, together with reimbursement of court costs in the amount of $1,292.38 and expenses in the amount of $3,882,34.

These suits were brought under 42 U.S.C. Sec. 1983, and after a trial which lasted for nine days, resulted in a verdict of $33,000 compensatory damages and $100,000 punitive damages. Subsequently, the Court set aside the punitive damage award and there remains only the compensatory damage award.

First, it is noted that plaintiffs' counsel contend that they are entitled to $45,970 by virtue of the number of hours spent multiplied by the rate of compensation which they receive in their practice. They then ask the Court to double this amount, a request which the Court immediately denies under the authority of *Oliver* v. *Kalamazoo Board of Education*, 576 F. 2d 714 (6th Cir. 1978).

Coming now to grips with the single amount requested, the Court notes that this case presented unusually complex questions under 42 U.S.C. Sec. 1983, in light of the lack of authorities directly applicable and in light of the quick-changing developments in this field of law, as manifested by the decision of the Supreme Court in *Monell* v. *Department of Social Services of the City of New York*, 436 U. S. 658 (1978) and *Turpin* v. *Mailet*, 591 F. 2d 426 (2nd Cir. En Banc. 1979).

The questions raised during the litigation were vigorously argued for hours in chambers and were skillfully presented by counsel for both sides. Many of the questions which were presented are far from free of doubt and will be resolved by future decisions of the United States Court of Appeals for the Sixth Circuit and the Supreme Court.

We agree with counsel for plaintiff that the guidelines set down in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 2d 714 (5th Cir. 1974) are of great help. Those guidelines are enumerated on page 2 of plaintiffs' brief and will not be repeated here, but are incorporated by reference.

With reference to the first guideline, "the time and labor required," the defendants have not taken issue with the figures submitted by plaintiffs. We previously noted the novelty and difficulties of the questions presented and the skill required to perform the legal services. We note that the total number of hours spent by plaintiffs' principal attorney, Mr. White, amount to 335.7 out-of-court hours and 97 in-court hours, and that his assistant, Professor Albert T. Quick, spent 65 hours in out-of-court research and 38 hours at the trial. The work spent by other associates is set out in their affidavits and will not be repeated at this time.

However, the affidavits submitted by counsel for plaintiffs do not reflect the amount of time spent in pursuit of unsuccessful claims against the City of Louisville, Col. John

Nevin, former Mayor Harvey Sloane, and former County Judge Todd Hollenbach. It will be recalled that all of these defendants, with the exception of defendant Hollenbach, were dismissed on a motion for summary judgment and that Judge Hollenbach was dismissed on a motion for directed verdict made at the conclusion of the plaintiffs' case-in-chief at trial.

In *Hughes* v. *Repko,* 578 F. 2d 483 (3rd Cir. 1978) it was held that a fee-petitioner cannot be treated as the prevailing party to the extent he has been unsuccessful in asserting a claim. This rule, of course, would be applicable regardless of the number of parties. Any other interpretation would run counter to the spirit of the Civil Rights' Attorney's Fee Awards Act of 1976, 42 U.S.C. Sec. 1988. See *Hughes, supra,* at p. 487.

In the absence of a breakdown of time spent by plaintiff's counsel as between their successful claims and their unsuccessful claims, the Court has resorted to an examination of the docket sheet and has reveiwed the brief prepared by the plaintiffs in connection with the motions of all parties for summary judgment.

The docket sheet indicates that the depositions of Col. Nevin of the Louisville Police Department and former Mayor Sloane were taken in an effort to keep the city defendants in the case. The brief filed by the plaintiffs in opposition to the motions filed by all of the defendants for summary judgment did not attempt to distinguish between the city and county defendants, it being the position of the plaintiffs that there were unidentified officers from both city and county who caused plaintiffs' injuries, and that, therefore, the law was applicable to both city and county.

A fair reading of the docket entries indicates that plaintiffs were concentrating their efforts primarily against the county defendants. In light of the factual circumstances

developed through discovery and at the trial, this was a logical step for plaintiffs to have taken.

The Court is unable to allocate any fixed figure to the number of hours spent by counsel for plaintiffs in pursuing unsuccessful claims against the defendants referred to previously, as well as a very abortive effort to make the Commonwealth's Attorney a party, an effort which ended unsuccessfully upon the granting of a motion to dismiss the Commonwealth. However, it would seem not unfair to estimate that plaintiffs consumed possibly as much as 20% to 25% of their out-of-court time in pursuing their unsuccessful claims.

With regard to their in-court time, they prevailed on all of their claims for simple damages, except as to Judge Hollenbach, but subsequently lost on their claims for punitive damages. This Court observed clearly all of the actions taken by plaintiffs during the trial of the case, and is of the opinion that the great majority of their efforts were directed at obtaining a verdict for simple damages, although, of necessity, the Court and counsel all wrestled with the question for several hours of whether or not punitive damages was a proper matter for the jury, and, if so, what instructions were appropriate in connection therewith. Also, after the jury verdict was rendered, counsel for plaintiffs devoted some time in their memorandum to the upholding of the punitive damage award, although, here again, the chief thrust of their arguments were in connection with the compensatory damages award.

In connection with the hourly rates which plaintiffs' counsel cite, this Court has never approved a fee of $100 per hour for trial work. In cases involving awards of attorney's fees against governmental organizations such as counties and cities, the general practice of this Court has been to allow an overall fee of $50 per hour which, in recent instances, the Court has increased to $60 per hour for in-

trial work, and to $52.50 per hour for time spent in preparing legal memoranda. We believe that these figures are reasonable as a base in the usual case against a governmental organization which must operate within strict budgetary limits and whose resources are derived from taxation of people of the community.

Having reached this conclusion, it would ordinarily be appropriate to merely multiply the number of hours spent by counsel in pursuing their successful claims times the reasonable hourly rate established by the Court. However, in the case at bar, as in any other case where damages are recovered, the Court must take into consideration the damage awards and allow it some part in the fixing of a fee. If plaintiffs' attorneys were to be compensated strictly on the basis of time spent times reasonable hourly rate, the Court would be of the opinion that their fee should be $30,000. However, the total damage award reached is $33,000 and we know that attorneys who take cases on a contingency-fee basis usually set their fees at a figure not exceeding 50% of the amount recovered. In light of the unusual legal questions presented here and of the time spent by counsel in pursuing them, we are willing to award a fee in excess in 50% of the recovery, and believe that an award of $20,000 is just in light of all of the circumstances and the guidelines set out in *Johnson* v. *Georgia Highway Express, Inc., supra.*

In reaching this decision, we do not feel that it is necessary to comment upon the applicability of all the guidelines set out in *Johnson, supra.* We do note, however, that counsel for plaintiffs have stated that they will not accept a fee from their clients, although they had a contingency-fee arrangement with them. We note, also, that this case does not fall within the category of an undesirable case since, in this instance, counsel were representing members of the majority white race who were expressing senti-

ments which apparently were shared by a great many of their fellow-citizens.

We observe, also, that counsel has not advised us of any preclusion from other employment as a result of their employment in this case. Mr. White apparently is very active in the trial of tort cases and the preparation of the case at bar does not seem to have interferred with his activities in that respect. Professor Quick is on the faculty of the University of Louisville Law School and any employment he has had in this case is in addition to his usual occupation as a teacher.

Counsel for plaintiffs have filed an item entitled "Court Costs", which is in the amount of $1,292.38, and it appears to be entirely proper. In addition, plaintiffs are requesting reimbursement in the amount of $3,882.34 for many different types of expenses. The Court, in awarding expenses, is governed by the case of *Farmer* v. *Arabian American Oil Company*, 379 U. S. 227 (1964); 28 U.S.C. Sec. 1821 and 28 U.S.C. 1920; Federal Rules of Civil Procedure 54(d). *Farmer* holds that items proposed by winning parties as costs should always be given careful scrutiny and that the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. See 379 U.S. at p. 235.

Plaintiffs are seeking reimbursement in the amount of $1,500 for a model used at the trial of the action. Such models are not specifically listed in the applicable statutes and the Fourth and Fifth Circuits have held that the cost of procuring them are not recoverable by the prevailing party. See *Specialty Equipment & Machine Corp.* v. *Zell Motor Car Company*, 193 F. 2d 515, 520-521 (4th Cir. 1952); *Johns-Manville Corp.* v. *Cement Asbestos Products Company*, 428 F. 2d 1381, 1385 (5th Cir. 1970). However, in *Wahl* v. *Carrier Manufacturing Company, Inc.*, 511 F. 2d 209 (7th Cir. 1975), the court there pointed out that it had

allowed such costs to be recovered, but strongly suggested that in the future such costs should not be allowed unless prior approval of the court was secured. We believe that in this case it would be improper to make an award for the elaborate model used by the plaintiffs without prior approval as to the matter of costs granted by the Court. See, also, *W. F. & John Barnes Company* v. *International Harvester*, 145 F. 2d 915 (7th Cir. 1944), cert. denied, 324 U. S. 850 (1945).

The plaintiffs are also claiming $280 for psychological tests and evaluations. No mention is made as to the object of the psychological testing, and in a case where mental competency of the parties was not in issue, it is clear that there is no authority for the award of such a fee.

More important than that item is the amount claimed for George Tomberlin of $732, as expert witness fee, and $155.21 for his room at Stouffer's. It will be recalled that Mr. Tomberlin testified as an expert witness for a portion of one day. Under 28 U.S.C. Sec. 1821, plaintiffs are entitled to recover the amount of $30 for his testifying at the time, and the actual expenses of his travel by common carrier at the most economical rate reasonably available. See 28 U.S.C Sec. 1821(c)(1). In addition, under 28 U.S.C. Sec. 1821(d)(1), he should be paid a subsistence allowance not to exceed $35 per day when an overnight stay is required. See 28 U.S.C. Sec. 1821(d)(2).

As the Court best recalls it, Mr. Tomberlin was from the State of Maine and, no doubt, because of the relatively few flights between Maine and Louisville, was required to spend one night in Louisville in order to give his testimony at trial. Plaintiff should, therefore, submit to the Court a claim for Mr. Tomberlin's expenses by air, coach class, from his residence to Louisville and return. Plaintiffs' counsel are entitled to recover $70, as Mr. Tomberlin's

subsistence allowance, making a total of $65 awardable, plus the amount of the air fare.

Next, we note that plaintiffs are claiming $100 for the attendance at the deposition of Dr. David Karp, and $45 for the attendance of Dr. Michael Needleman at his deposition, together with $25 paid Dr. Needleman for a consultation. Dr. Karp and Dr. Needleman are entitled to be paid at the rate of $30 for attendance at their depositions. See *Sperry Rand Corporation* v. *A-T-O, Inc.*, 58 F.R.D. 132 (E.D. Va. 1973).

Other items claimed by the plaintiff such as expenses for film, lost wages, parking expenses, transportation for witnesses, and copies of cases are not allowed. See 28 U.S.C. Sec. 1920 and *Wahl* v. *Carrier Manufacturing Company, Inc., supra.* We believe that probably the items of $8 and $15 for medical records should be recognized as legitimate expenses of litigation.

An item of $113.20 is entitled "Roger O'Neil Appearance at trial." Roger O'Neil was a witness who testified at the trial and, like other witnesses, is entitled to $30 for his attendance at the trial. If he, as a nonresident of Kentucky, was compelled to use a common carrier to attend the trial or drove his own vehicle, then such expense is reimbursable in the manner already set out by the Court, but Mr. White's exhibit does not contain this information. Plaintiffs will be given the opportunity, within 10 days, to provide the Court with any information as to Roger O'Neil's expenses and the transportation expense of Mr. Tomberlin.

Finally, we agree that Mr. White should be reimbursed for copies of depositions which he has listed in the Fee Petition Exhibit.

An order in accordance with this memorandum opinion will be entered this day.

(s) Charles M. Allen
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., Et Al. - - - *Defendants*

ORDER—Entered 10/25/79

Counsel for plaintiffs, having petitioned the Court for attorneys' fees of $91,940, together with reimbursement of court costs in the amount of $1,292.38 and expenses in the amount of $3,882.34, and the Court, having rendered its memorandum opinion and being fully advised in the premises,

It Is Ordered that defendant, Jefferson County, Kentucky, pay the sum of $20,000 to counsel for plaintiffs as fees for their services on successful claims rendered in this action, and reimburse plaintiffs' counsel in the amount of $1,292.38 for court costs advanced by them, which is set out in Exhibit A, and reimburse them in the amount of $203 for the expenses claimed in Exhibit B, subject, however, to the right of plaintiffs' counsel to produce to the Court a proper statement as to the costs of Mr. George Tomberlin's air fare between the place of his residence and Louisville, Kentucky and return, and the air fare of Roger O'Neil between the place of his residence and Louisville,

Kentucky and return, if applicable. Said statements should be presented in an affidavit by counsel within 10 days hereinafter.

This is not a final and appealable order.

(s) Charles M. Allen
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., ET AL. - - - *Defendants*

FINAL JUDGMENT—Entered 11/19/79

This action, having been tried before a jury and having resulted in various jury verdicts, including compensatory and punitive damages for the plaintiffs, and the Court, having subsequently stricken the award of punitive damages, and the question of attorneys' fees having been tried by the Court, and the question of reimbursable expenses now having been decided by the Court,

It Is Ordered and Adjudged that plaintiff, Donald L. Hays, Jr., recover the sum of $20,000 as against Jefferson County, Kentucky, and $5,000 as against Col. Russell McDaniel and $5,000 as against Major Wilbur Bilyeu.

It Is Further Ordered and Adjudged that plaintiff, Michael C. Potter, recover the sum of $[illegible],000 compensatory damages as against Jefferson County, Kentucky, and $500 as against Col. Russell McDaniel, and $5,000 as against Major Wilbur Bilyeu.

It Is Further Ordered and Adjudged that the defendant, Jefferson County, Kentucky, pay the sum of $20,000 to counsel for plaintiffs as attorneys' fees, and that it

reimburse plaintiffs the sum of $1,292.38 for court costs advanced by them, and reimburse them in the amount of $651 as expenses claimed in plaintiffs' Exhibit B.

This is a final and appealable judgment and there is no just cause for delay.

(s) Charles M. Allen
Chief Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., ET AL. - - - *Defendants*

AMENDED FINAL JUDGMENT—Entered 12/4/79

This matter, having proceeded to final judgment, entered November 19, 1979, and it having come to the Court's attention that the Jury's verdict was correctly recited in the judgment entered June 29, 1979, but incorrectly recited in the final judgment, and it appearing that this matter should be corrected pursuant to Federal Rules of Civil Procedure 60(a),

It Is Ordered and Adjudged that the third paragraph of the final judgment herein, entered November 19, 1979 be and it is hereby amended to read as follows:

> It Is Further Ordered and Adjudged that plaintiff, Michael C. Potter, recover the sum of $2,000 compensatory damages as against Jefferson County, Kentucky, and $500 as against Col. Russell McDaniel, and $500 as against Major Wilbur Bilyeu.

This is a final and appealable judgment and there is no just cause for delay.

(s) Charles M. Allen
Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 80-3010, 80-3011

DONALD L. HAYS, JR. and
MICHAEL C. POTTER - - - *Plaintiffs-Appellees, Cross-Appellants*

v.

JEFFERSON COUNTY, KENTUCKY,
WILBUR BILYEU and
RUSSELL McDANIEL - - - *Defendants-Appellants, Cross-Appellees*

OPINION

March 10, 1982

Before MERRITT and JONES, Circuit Judges, and GIBSON,* District Judge.

ORDER

Upon receipt and consideration of the petitions for rehearing filed herein by the plaintiffs-appellees, cross-appellants, and defendants-appellants, cross-appellees, the Court concludes that the issues raised therein were fully considered upon the original submission and decision of this case. 668 F. 2d 869.

The petitions for rehearing are denied.

MERRITT, BROWN, KENNEDY and MARTIN, Circuit Judges, dissenting.

---

*The Honorable Benjamin F. Gibson, Judge, U.S. District Court for the Western District of Michigan, sitting by designation.

We dissent from the order of the Court in this case denying defendant-appellant's petition for en banc reconsideration. The case raises significant questions concerning the standard of liability of municipal and county governments and police and other supervisory officials under the Fourteenth Amendment and 42 U.S.C. § 1983. These questions frequently arise in the District Courts. The standards announced in the panel decision predicating a constitutional violation and, therefore, liability on a "failure to train" or training that is "grossly negligent" are inadequate standards as the dissenting opinion points out.

In addition to the weaknesses in the majority opinion pointed out by the dissent, it should be noted that on the county's liability the majority opinion is internally inconsistent. The District Judge granted a directed verdict on the plaintiffs' claim under § 1983 because as against the county there had been no showing of a "policy or custom" as required by *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The question then is whether a different standard applies in a direct action under the Fourteenth Amendment. Our Court's opinion in *Jones* v. *City of Memphis*, 586 F. 2d 622, 624-25 (6th Cir. 1978) and good policy both require that the "policy or custom" standard be the same whether the action against the county is under § 1983 or directly under the Fourteenth Amendment. Since the majority decision remands the case for a new trial in the direct action under the Fourteenth Amendment against the county, it is necessarily saying that the standard in the two types of actions is somehow different. Yet the majority opinion seems to be saying that the two standards are the same. Since the trial judge directed a verdict under § 1983, it follows that if the same standard is used in the direct action, the trial court must direct a verdict there as well. Either the trial court erred in directing a verdict under

§ 1983 when it found no evidence of a "policy or custom" or it erred in failing to direct a verdict on the direct action as well, if the two standards are the same. The rulings of the trial court on the § 1983 claim and the direct action claim, and the rulings by the panel majority of our Court, are inconsistent, assuming that the same standard is applied to both.

The panel decision properly recognizes that *respondeat superior* does not apply in an action against supervisory personnel and municipal governments under 42 U.S.C. § 1983 (*Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)) or directly under the Constitution (*Jones* v. *City of Memphis*, 586 F. 2d 622 (6th Cir. 1978)). Nevertheless, it then holds that a municipality would be liable whenever "principal officials" thereof are liable because "[a] governmental entity can only act through its principal officials." At 875. This is a species of *respondeat superior* liability. On the contrary, as we read *Monell*, it is not enough, to make a case of liability against a municipality under § 1983, to make such a case against a "principal official" acting within the scope of his employment. As Justice Brennan's opinion states in *Monell*, 436 U. S. at 694, 98 S. Ct. at 2037:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

It is one thing to hold a municipality liable for conduct of its employees, principal officials or otherwise, where the conduct is in execution of the government's "policy or

custom" and quite another thing to hold the municipality liable for conduct of an employee simply because he was a "principal official" acting or not acting within the scope of his employment. For example, a chief or assistant chief of police might be "grossly negligent" (at 874) and yet his conduct could not be said to represent official policy.

TRANSCRIPT OF TESTIMONY

VOLUME VI

117

Now training is one thing. Maybe the jury should not be instructed on training. There is no proof they were improperly trained. It narrows down to control or supervision. There is no proof that Major Bilyeu did not supervise them properly, but to the extent of the misidentification. So really you get down to control, and there should be some way, I think, that the county should be able to control their actions. I don't know, I am not a military man. I don't know how it would be. Mr. White?

TRANSCRIPT OF TESTIMONY

VOLUME V

86

Mr. Mosley: So from the standpoint of your opinion now, there's been no facts with regard to that particular question, from your opinion, the only error that you thought was committed that night was the fact that Major Bilyeu was unable to communicate to his men that they were not to cross Preston Highway, isn't that correct?

A. Yes sir.

Q. And as far as you can tell, based upon the hypothetical and the facts that you know, there was no other improper act on Major Bilyeu's part that evening?

A. No sir.

TRANSCRIPT OF TESTIMONY

VOLUME VII

167

Q. Now at what point was that?

A. All right. When the chemical was launched, then within a few seconds after the chemical was launched and had lit both in the back side of the crowd and along the curb, now the chemical was sent both in the rear of the crowd and in front of the crowd because of the wind factor, the wind factor being very important in moving your crowd.

As the men, as trained, moved forward, I made the decision then that I just simply wanted that chemical to have a few more seconds, to continue dissipating the crowd.

Q. All right.

A. But they, of course, continued, as they should have.

Q. Well, at some point, in terms of the dispersal of the gas, did you want the men to cross the street?

A. Yes.

Q. So is it your testimony then that the reason for that particular order was to just let the gas have a few more seconds to . . .

A. That's all we're talking about is just a few more seconds.

TRANSCRIPT OF TESTIMONY

VOLUME V

84

Q. In your thec y or understanding of these type situations, isn't it also true that the person in charge does not go over to the scene of the crowd or does not become immersed in the crowd, isn't that good, tactical training as far as a person in charge is concerned?

A. Yes sir.

Q. So the fact that Major Bilyeu did not cross the street was part of what good crowd control would tell you, isn't that true?

A. Yes sir.

TRANSCRIPT OF TESTIMONY

VOLUME IV

139

Q. I wonder if you would tell the jury, in your opinion, and you used a term in your deposition as to how you thought the county police conducted themselves on the evening of September 26th at Bittersweet Shopping Center.

A. Well, the activities that I saw, saw them participate in, which was up until the time they entered the shopping center, was conducted as close by the book as you could do it. They—the people who launched the gas and the movements were very professional.

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Actions No. C 75-0335 L(A) & C 76-0424 L(A)

DONALD L. HAYS, JR. and
MICHAEL POTTER - - - - - - - *Plaintiffs*

v.

JEFFERSON COUNTY, KY., Et Al. - - - *Defendants*

CHARGE TO THE JURY—Given 4/19/79

Members of the Jury:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiffs, Donald L. Hays, Jr. and Michael C. Potter, and the answer thereto of the defendants, Jefferson County, Kentucky, Russell McDaniel, Major Wilbur Bilyeu. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion. Both the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

Unless otherwise stated, the jury should consider each instruction given to apply separately and individually to each plaintiff and to each defendant in the case.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A county is entitled to the same fair trial at your hands as a private individual. The law is no respector of persons; all persons, including counties, stand equal before the law, and are to be dealt with as equals in a court of justice.

The burden is on the plaintiffs in a civil action, such as this, to prove every essential element of their claim by a preponderance of the evidence. If the proof should fail to

establish any essential elements of plaintiffs' claim by a preponderance of the evidence in the case, the jury should find for the defendants.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find", or "if you decide", I mean you must be persuaded, concerning all the evidence in the case, that the proposition is more probably true than not true.

The fact that I have instructed you on the proper measure of damages should not be considered as an indication of any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given only for your guidance, in the event that you should find in favor of either plaintiff on the question of liability, by a preponderance of evidence and in accord with the other instructions.

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material

matter, in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does produce such belief in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each

witness may bear either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves.

During the trial of this case, certain testimony has been read to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

This is a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, arising out of alleged actions of officers of the Jefferson County Police Force which took place on September 26, 1975 at the Bittersweet Shopping Center. In order for plaintiffs to recover against defendants Bilyeu and Mc-

Daniel the burden of proof is upon the plaintiffs to establish each of the following elements:

1. That officers of the Jefferson County Police Force knowingly beat, bruised and wounded plaintiffs or either of them about the body.
2. That the defendants Bilyeu and McDaniel then and there acted under color of some law of the State of Kentucky or ordinance or regulation of the County of Jefferson or some regulation or order issued by the Chief of Police or the Assistant Chief of Police of the County of Jefferson.
3. That the defendants Bilyeu and McDaniel by their acts and conduct deprived the plaintiffs of their federal constitutional rights not to be denied or deprived of their liberty without due process of law as phrase is defined and explained in these instructions.
4. That the defendants Bilyeu and McDaniel failed in their duty to adequately supervise, train and control the police officers who were under their command at Bittersweet Shopping Center, and that such failure to supervise, train and control were the proximate cause of injury and damage to the plaintiffs.

You are further instructed that you may not return a verdict against the defendants Bilyeu and McDaniel if you believe from the preponderance of the evidence that the plaintiffs were deprived of their constitutional rights by policemen of Jefferson County acting under color of law merely because of the fact that these policemen were employees of Jefferson County, Kentucky. In other words, if you believe that the defendants Bilyeu and McDaniel adequately supervised, trained and controlled the police officers then you shall return a verdict for all of the defendants, even though you may believe, from the preponderance of the evidence, that individual policemen in the employment of Jefferson County knowingly beat, bruised and wounded the plaintiffs on the occasion complained of.

You are further instructed by way of definition that an act is "knowingly" done if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

"Intent" ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

Acts are done "under color of law" of a state, county, or municipality not only when officials or officers act within the bounds or limits of their lawful authority, but also when such officers act without and beyond the bounds of their lawful authority. In order for unlawful acts of an official to be done "under color of any law," however, the unlawful acts must be done while the official is purporting or pretending to act in the performance of his official duties; that is to say, the unlawful acts must consist in an abuse or misuse of power which is possessed by the offcial only because he is an official; and the unlawful acts must be of such a nature, and be committed under such circumstances that they would not have occurred but for the fact that the person committing them was an official, purporting to exercise his official powers.

As you will note, the federal statutes, which the defendants are alleged to have violated, cover not only acts done by an official under color of any state law but also

acts done by an official under color of any ordinance or regulation of any county or municipality of the state, as well as acts done by an official under color of any regulation or order issued by any state, or county or municipal official, and even acts done by an official under color of some state or local custom.

So, the phrase "under color of state law" includes acts done under color of any state law, or county or municipal ordinance, or any regulation issued thereunder, or any state or local custom.

As stated before, the Fourteenth Amendment to the Federal Constitution provides that no state shall deprive any person of his liberty without due process of law. The "liberty" of the individual, which the Federal Constitution thus secures and protects, is not an absolute and unqualified freedom or privilege to do as one pleases at all times and under all circumstances; but is always subject to reasonable restraints, including of course such restraints as are imposed by law. The plaintiffs in this case, in common with the defendants and all other persons who live under the protection of our Constitution, had the legal right at all times not to be deprived, without due process of law, of any liberty secured or protected to him by the Constitution or laws of the United States.

The plaintiffs had at the time of the demonstration the liberty to be free from unlawful attacks upon the physical integrity of their persons. It has always been the policy of the law to protect the physical integrity of every person from unauthorized violation or interference.

To be deprived of liberty "without due process of law" means to be deprived of liberty without authority of the law.

As police officers and policemen at the scene of the Bittersweet demonstration, the police officers of Jefferson County had the lawful authority, indeed the lawful duty

under law, to preserve the peace; to prevent demonstrators from injuring one another or property; generally to enforce order among the demonstrators; and particularly to protect life and property at the center and surrounding areas. The police officers of Jefferson County had the lawful authority, indeed to lawful duty under law, to use such physical force as may have been reasonably necessary to prevent harm to life at the Bittersweet Center at the time and place which is the subject of this action; to enforce compliance with proper instructions; to protect other persons, and, themselves as well, from physical harm at the hands of the demonstrators, including the plaintiffs.

If you find from a preponderance of the evidence that injuries were inflicted upon the plaintiffs by officers of the Jefferson County police, and such injuries were inflicted for any one or more of the lawful purposes mentioned in the preceding paragraph, such conduct of these police officers was not unlawful, unless you further find from the preponderance of the evidence that the police officers used more or greater force that it would have appeared to a reasonable person to be necessary in order to accomplish the lawful purposes intended.

If you further believe from the preponderance of the evidence that any unlawful acts of the individual police officers resulted in injuries to the plaintiffs, and that such acts took place because of the failure of defendants Bilyeu and McDaniel to adequately supervise, train and control the officers, and that such acts were committed under color of state law and were the proximate cause of plaintiffs' injuries, then you should find for the plaintiffs.

An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage;

and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in each such case, each must be a proximate cause.

If you should find from a preponderance of the evidence that the defendants Bilyeu and McDaniel acted in a manner that was reasonable and in good faith under all of the circumstances which were attendant on the night of September 26, 1975, then you shall return a verdict for them.

If you find for the plaintiffs on the issue of compensatory damages, you shall award plaintiff Hays his medical and hospital expenses in the amount of $1,095.24 and a further amount of $356 for his lost wages up to October 17, 1975 and a further sum of $1,461.18 as lost wages from October 17, 1975 to November 15, 1975, if you believe that he was unable to return to work prior to November 15, 1975, and such amounts as you believe will reasonably compensate him for his pain and suffering and mental anguish, and also, for the additional sum of $300 for the damage done to his automobile.

As to the plaintiff Potter, if you find for him on the issue of compensatory damages, you shall award him the sum of $93.52 for his medical expenses and shall award him such sum as you may think just for his pain and suffering and mental anguish.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve

as an example or warning to others not to engage in such conduct.

If the jury should find from a preponderance of the evidence in the case that plaintiffs are entitled to a verdict for actual or compensatory damages; and should further find that the act or omission of the defendant Bilyeu which proximately caused actual injury or damage to the plaintiffs, was wanton, then the jury may, if in the exercise of discretion they unanimously choose so to do, add to the award of actual damages such amount as the jury shall unanimously agree to be proper, as punitive and exemplary damages.

In addition to actual damages, the law permits the jury, under certain circumstances, to award the injured person punitive and exemplary damages, in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

The jury should bear in mind, not only the conditions under which, and the purposes for which, the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

If you should award punitive damages as against Major Bilyeu such award should also run against the defendant, Jefferson County.

You further are instructed that the evidence that plaintiffs suffered injuries from unidentified policemen and the extent of those injuries should not play any part in your

consideration as to whether to award punitive damages as against Major Bilyeu and Jefferson County, and that your award, if any, must be based on the considerations which I have outlined above.

This is also a civil action brought by the two plaintiffs asking for damages, both compensatory and punitive, because of alleged negligent acts or omissions of high ranking Jefferson County officials, namely Police Chief Russell McDaniel and Assistant Police Chief Wilbur Bilyeu, arising out of actions of officers of the Jefferson County Police Force which took place on September 26, 1975 at the Bittersweet Shopping Center. A government can act in this case, only through its high ranking officials, Chief McDaniel and Assistant Chief Bilyeu. The burden is on the plaintiffs to establish by a preponderance of the evidence in this case that the negligence of one or both of the officials, Chief McDaniel and Assistant Chief Bilyeu, was a proximate cause of any injuries and consequent damages sustained by the plaintiffs.

In order for plaintiffs to recover against defendant, Jefferson County, the burden of proof is upon the plaintiffs to establish each of the following elements:

1. That officers of the Jefferson County Police Force knowingly beat, bruised and wounded plaintiffs or either of them about the body.

2. That Chief McDaniel and Assistant Chief Bilyeu were employed by Jefferson County as Chief of Police and Assistant Chief of Police respectively, at the time of the injuries referred to herein.

3. That Chief McDaniel and Assistant Chief Bilyeu, or either of them, negligently supervised, trained or controlled the police officers under their command at Bittersweet Shopping Center and that such negligence in supervision, training and control was the proximate cause of the

injuries of plaintiffs or either of them, inflicted upon them by police officers on the occasion complained of.

You are further instructed that you may not return a verdict against the defendant, Jefferson County, if you believe from the preponderance of the evidence that the plaintiffs were injured by policemen of Jefferson County merely because of the fact that these policemen were employees of Jefferson County, Kentucky. In other words, if you believe that Chief McDaniel and Assistant Chief Bilyeu adequately supervised, trained and controlled the police officers, then you shall return a verdict for the defendant, Jefferson County, even though you may believe, from the preponderance of the evidence, that individual policemen in employment of Jefferson County knowingly beat, bruised and wounded the plaintiffs on the occasion complained of.

You are further instructed that:

1. Negligence is lack of ordinary care. It is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. It may arise from doing an act which a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act which a reasonably prudent person would have done under the same circumstances.

2. Negligence require[s] both a foreseeable danger of injury to another and conduct unreasonably in proportion to the danger. A person is not responsible for the consequences of his conduct unless the risk of injury was reasonably foreseeable. The exact occurrence or precise injury need not have been foreseeable; but injury as a result of negligent conduct must have been not merely possible but probable.

If a reasonably prudent person could not foresee any injury as a result of his conduct, or if his conduct was reasonable in the light of what he could foresee, there is no negligence. Conversely, there is negligence if a reasonably prudent person could foresee injury as a result of his conduct, and his conduct was unreasonable in the light of what he could foresee.

3. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence.

4. A proximate cause of an injury is a cause which, in natural and continuous sequence, produces the injury, and without which the injury would not have occurred.

5. There may be more than one proximate cause of an injury. When negligent conduct of two or more persons contributes concurrently as proximate causes of an injury, the conduct of each of said persons is a proximate cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a proximate cause of the injury.

If you believe from the preponderance of the evidence that the officers Bilyeu and McDaniel acted with reasonable care considering all of the circumstances which confronted them, then you shall return a verdict for Jefferson County.

With regard to the claim of the plaintiffs against Jefferson County, I will give you these instructions; as police officers and policemen at the scene of the Bittersweet

demonstration, the police officers of Jefferson County had the lawful authority and, indeed, the lawful duty under law to preserve the peace, to prevent demonstrators from injuring one another or property and generally to enforce order among the demonstrators and particularly to protect life and property at the Center and building areas, and they have the lawful authority, indeed the lawful duty to use such physical force as may have been necessary, reasonably necessary, to prevent harm to life at the Bittersweet Center at the time and place which is the subject of this action, and to enforce compliance with proper instructions to protect other persons and themselves as well from physical harm at the hands of the demonstrators.

And further, if you find from the preponderance of the evidence that the injuries that were inflicted upon the plaintiffs by officers of the Jefferson County Police and such injuries were inflicted for any one or more of the lawful purposes mentioned in the aforesaid paragraph that conduct was not unlawful unless you further find from the preponderance of the evidence that the police force, police officers used more or greater force than it would have appeared to a reasonable person to have been necessary in order to accomplish the lawful purpose intended.

In reaching your decision in this case, you shall not consider any of the evidence concerning the investigation made by the Jefferson County Police Department on or after the night of September 26, 1975, concerning alleged acts of police misconduct which occurred there. You may not consider this evidence for any purpose whatsoever.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.

You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges—judges of facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesman here in Court.

Forms of verdict have been prepared for your convenience.

(Forms of verdict to be read)

You will take these forms to the jury room and, when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form which sets forth the verdict upon which you unanimously agree; and then return with your verdict to the courtroom.

END OF DOCKET